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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

EDITED BY

CHRISTOPHER ROBINSON, Q. C.

VOL. XXXV.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM, 37 VICTORIA, TO MICHAELMAS TERM, 38 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

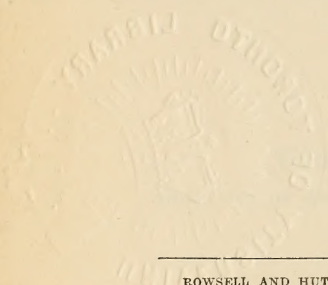
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REPORTS OF CASES

OF THE

COURT OF QUEEN'S BENCH



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J U D G E S
OF THE
COURT OF QUEEN'S BENCH.

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

Attorney-General :
THE HONORABLE OLIVER MOWAT.

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REPORT OF CASES

IN THE

COURT OF QUEEN'S BENCH.

EASTER TERM, 37 VICTORIA, 1874.

May 18th, to June 6th.

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

BURKE V. MCWHIRTER.

Insolvent Act of 1869, sec. 50—Replevin.

Where the goods of A., having been seized by the sheriff under an execution against B., had been handed over by the sheriff to an assignee, to whom B. had made a voluntary assignment in insolvency: *Held*, that A. might maintain replevin against the assignee.

Held, also, that sec. 50 of the Insolvent Act of 1869 could not apply against the plaintiff, who was not a creditor or in any way interested in the estate of the insolvent.

REPLEVIN. Pleas: 1. That the defendant did not take the goods. 2. That the goods were the goods of the defendant, and not of the plaintiff.

Issue.

The cause was tried before Hagarty, C. J. C. P., at the last Fall Assizes held at Woodstock.

It was admitted the defendant was the assignee in insol- of R. H. Burke, under an assignment dated the 25th of October, 1872.

On the 29th of October the plaintiff notified the sheriff that he claimed the goods, the sheriff then having possession of them under an execution at the suit of one Noble against the insolvent.

On the 1st and 2nd of November the sheriff delivered the goods to the defendant as assignee.

The defendant contended that replevin would not lie, as the goods were *in custodia legis*.

The plaintiff had a verdict, the jury finding that the goods were the property of the plaintiff, and not of the insolvent, and they assessed the damages at \$4.

In Michaelmas term *Harrison*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, on the ground of misdirection, because the learned Chief Justice directed the jury that this action of replevin would lie against the defendant, who was official assignee, and who held the goods in his official character, so that the goods were *in custodia legis* at the time the writ of replevin was executed; and on the ground that a replevin was prohibited by the Con. Stat. U. C., ch. 29, sec. 2, and that the plaintiff's only remedy was by order of the Judge on a summary petition in vacation, or of the Court on a rule in term, and not by writ of attachment, opposition, seizure, or other proceedings of any kind whatever.

In this term, *Read*, Q. C., shewed cause. The question is, whether the goods could be replevied from the official assignee, who received them from the sheriff, who had them under an execution, when they could not have been replevied from the sheriff. The official assignee is not a public officer, so as to be entitled to a notice of action: *Archibald v. Haldan*, 30 U. C. R. 30. He also referred to *Jameson v. Kerr*, 8 C. L. J. N. S. 240, as a decision expressly in point, and in his favour, that a replevin could issue for goods in the hands of an assignee in insolvency.

Harrison, Q. C., supported the rule. Too narrow a construction has been placed on sec. 2 of the Replevin Act,

in the case last mentioned. The Statute and the one which it consolidates shew plainly there can be no replevin against the sheriff, to take from him any goods whatever which he has in his possession under any process of law. By the Insolvent Act of 1869, sec. 50, the assignee is an officer of the Court, and property cannot be taken from him by any action or seizure. He referred also to secs. 20, 23, 25, 29, of the Insolvent Act, and to *Dumble v. White*, 32 U. C. R. 601, and *Crombie v. Jackson*, 34 U. C. R. 575.

WILSON, J., delivered the judgment of the Court.

The notes of the trial shew no opinion or direction expressed or given by the learned Chief Justice either for or against the objection that was taken.

It is very likely there was an opinion expressed, and that it was formally given so as to entitle the parties to move against it if so advised as for a misdirection.

An action of replevin, according to the law of England, was always a proper remedy for any unlawful taking of goods, whether by distress or otherwise. The cases are cited by Mr. Williams in his argument in *George v. Chambers*, 11 M. & W. 149, 158, and the Court in that case affirmed that to be the law. The later cases are *Allen v. Sharp*, 2 Ex. 352; *Mennie v. Blake*, 6 E. & B. 842; *Gay v. Matthews*, 4 B. & S. 425.

The Consol. Stat. U. C., ch. 29, sec. 1, declares that "in case any such goods * * have been otherwise" (than by distress, which is especially mentioned in a provision by itself) "wrongfully taken or detained, the owner or other person * * capable * * of maintaining an action of trespass or trover * * may bring an action of replevin for the recovery thereof."

The second section of the Act declares that the provisions "shall not authorize the replevying of or taking out of the custody of any sheriff or other officer, any personal property seized by him under any process issued out of any Court of record."

The question was argued whether this enactment is so expressed that a third party or stranger to the judgment and execution, whose goods have been unlawfully taken by the sheriff under an execution for the debt of another, can or cannot maintain an action of replevin for the recovery of his goods.

It is said that cannot be done, because the goods are in the custody of the law, and the law ought to guard them.

But are they in the custody of the law as against the true owner? Why are they to be taken out of his custody?

The Court has directed the sheriff to take the goods of A., and he takes the goods of B.; he has no warrant or authority to do that,—he is a trespasser and wrong-doer. The purchaser at such a sale is in no better position than the sheriff: *Cooper v. Chitty*, 1 Burr. 20; *Farrant v. Thompson*, 5 B. & A. 826. Property cannot pass where the person executing the power to sell has not the power he is assuming to execute. If the sheriff is a wrong-doer and trespasser, and liable to be sued as such, he is a person who has wrongfully taken the goods, within the words of the Replevin Act.

The sheriff in such a case might be lawfully resisted by the owner of the goods: *Polkinghorn v. Wright*, 8 Q. B. 197; or they might rightfully be retaken by the owner from the sheriff: 3 Bl. Com. 4.

Why then, it may be said, should not the owner be entitled to the process of the Court to aid him in getting his goods peaceably, in place of resorting to force to recover them? The sheriff may certainly abandon the possession of goods which he has wrongfully taken. If he will not do so voluntarily, why should he not be made to do it by the process of the Court?

In *Short v. Ruttan*, 12 U. C. R. 79, the question was not raised under the 14–15 Vic., ch. 64.

In *Calcutt v. Ruttan*, 13 U. C. R. 146, it was held the 18 Vic., ch. 118, did prevent a third party from suing out a replevin to operate upon goods in the possession of the debtor at the time the sheriff had an execution against his

goods. It is not necessary to say more on this point, for that is not the question here, because this is not a case of seizure under an execution, but a delivery over of the debtor's goods by the sheriff to the official assignee, by reason of the assignment which the debtor had made.

If the goods could have been replevied from the sheriff by this plaintiff while he had them under an execution, then unquestionably they may be replevied from the assignee. But although they could not have been replevied from the sheriff, it would not follow that under our statute they could not be replevied from the assignee. The delivery by the sheriff to him is no more than the delivery by the debtor to him.

It is not every case in which trover or detinue will lie, that replevin will also lie in England: *Mennie v. Blake*, 6 E. & B. 842. But under our Act, wherever trespass or trover may be maintained, replevin may also be brought.

In *Jameson v. Kerr*, 8 C. L. J. N. S. 241, Mr. Justice Gwynne, after careful consideration, granted a writ of replevin against the assignee in insolvency, who had got possession of the disputed goods by a writ of attachment under the Insolvent Act.

I quite agree with that judgment, and the writ must be maintainable when it is issued upon a mere delivery over by the sheriff, without process at all.

As to the argument that by the 50th section of the Insolvent Act of 1869 "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property upon, in, or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the Judge on summary petition in vacation, or of the Court on a rule in term, and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever."

Although the words are very large and comprehensive, I do not think they can be construed so as to compel a person not a creditor of the insolvent, nor having anything to do with the distribution of his estate, and who claims

the goods in question as his own, and denies that they are or ever were the property of the debtor, to apply to the Judge of the County Court or to the County Court for relief, and to debar him from every other remedy. The words are, that "all remedies * * for enforcing *any claim for a debt, privilege, mortgage, hypothec, lien, or right of property*] upon, &c., shall be pursued in the manner pointed out. And all these expressions indicate that the person making the claim, or seeking the remedy, is a creditor or claimant upon the estate, otherwise he could not have a *debt, &c.*

It is the last words, "*or right of property upon,*" &c., which are calculated to mislead; for if read in their generality they would embrace every claim whatever upon, in or to any effects or property which the assignee had got hold of, although the debtor had not a particle of claim or title to the property. If so wide a construction were put upon that section, it would make the estates of other persons as well as of the insolvents amenable to the jurisdiction, and to the exclusive jurisdiction, of the Insolvent Court.

It may be that such an enlargement of the power of the Court was intended, and that the protection of the assignee and the general benefit of creditors were also objects in the contemplation of the Legislature; but if so the enactment is not so plainly expressed as to draw everything within that jurisdiction, simply because the assignee has got hold of goods, although he has no kind of title to them, and the person 'claiming them is not a creditor, and so no party to the insolvency proceedings, but a perfect stranger to them, as is the case of this plaintiff.

We think the rule must be discharged.

See *Ex parte Barron, In re Edwards*, 9 L. R. ch. 673.

Rule discharged.

NICHOLSON V. GUNN.

Insolvent Act of 1869—Composition—Reconveyance to insolvent.

Declaration on the common counts. Plea, that the plaintiff before action made an assignment under the Insolvent Act of 1869, to an official assignee, in whom the causes of action became vested. Replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed by the requisite number in value of the creditors, duly reconveyed to the plaintiff all the estate, &c., theretofore belonging to the plaintiff and then vested in the assignee. Rejoinder, that after the deposit of the deed of composition and discharge with the assignee by the plaintiff, the assignee did not immediately give notice of such deposit by advertisement, as required by the Act. *Held*, on demurrer, rejoinder good, for by the Statute the giving of such notice is a condition precedent to the reconveyance by the assignee, which, without it, does not bind non-assenting creditors.

Held, also, replication good, for under the averment that the assignee *duly* reconveyed, the plaintiff would be bound to prove such notice, in the absence of a confirmation by the judge.

DECLARATION, on the common counts.

Plea: that the plaintiff before action made an assignment to an official assignee, under the Act of 1869, and the causes of action became vested in the assignee.

Replication: that before the commencement of this action, the official assignee, in conformity with the terms of a deed of composition and discharge duly executed, by the requisite number in value of the plaintiff's creditors, by deed duly reconveyed, transferred, and assigned to the plaintiff all the estate, &c., theretofore belonging to the plaintiff and then vested in the official assignee; and by reason of the premises, and before the commencement of this action, the causes of action were duly vested in the plaintiff.

Second rejoinder: that after the deposit of the deed of composition and discharge with the assignee by the plaintiff, the assignee did not immediately give notice of such deposit by advertisement, as required by the said Act.

Demurrer to the rejoinder, on the ground that the want of notice by advertisement by the assignee did not deprive the insolvent of the benefit of the deed, the statute in that respect being only directory.

The defendant joined in demurrer, and gave notice of exceptions to the replication: that the plaintiff confessed

the plea and the assignment mentioned therein, but did not avoid the same: that the assignee having executed a deed transferring to the plaintiff all the estate theretofore belonging to the plaintiff, is no answer to the plea, without more, and without alleging an order confirming the same: that the execution of the deed by the requisite number in value of the creditors was not a sufficient execution.

The replication was amended on the argument, as against the last exception.

M. R. Vankoughnet, for the plaintiff. The assignee is to give notice when a deed of composition and discharge is executed, if ordered so to do: Insolvent Act of 1869, sec. 97. But the insolvent is not to lose the benefit of the deed because the assignee does not give notice of advertisement. A purchase at sheriff's sale is not avoided because the sheriff has not given notice of the sale. Sec. 96 puts a deed from the assignee to the debtor on the same footing as a deed from the assignee to any one else. An order to confirm a deed of composition and discharge is not required: secs. 101, 102. The creditors must come in under sec. 97 within three juridical days, and object; if they do not, the assignee may act on the deed of composition and discharge, and so he may make the conveyance to the debtor. The defendant, who is a debtor to the insolvent, should not be allowed to raise this question. The assignee could not claim the debt from the defendant if he pay the plaintiff, as the assignee would be estopped by his own deed to the plaintiff.

McCarthy, Q. C., contra. The defendant may be called on to pay the debt again if he pay the plaintiff, and that is the defence which the defendant is now setting up. The assignee's deed is not valid if the assignee was not entitled to act upon the deed of composition and discharge; and he was not until after the necessary notice was given, and until after the expiration of the period which was allowed to the creditors within which they might object to the composition and discharge, and no objection was made to

it; and, if objection was made to it, then the assignee was not at liberty to act upon the composition and discharge, whether the opposition was withdrawn or not, until the deed had been confirmed. The creditors having had no notice of the deed had no opportunity to object to it, and it cannot be said the assignee can bind the creditors or deal with the estate in that way. If the assignee be barred by his deed he may be removed, and another appointed in his place. It is not necessary to lodge the deed with the assignee. The debtor may get it confirmed at once under the 101st section of the Act. If it is not confirmed at once, the debtor must proceed under the 97th section. The creditor, under sec. 102, may require the deed to be brought in, and if it be not it may be annulled without any inquiry. See also *Allan v. Garratt*, 30 U. C. R. 165; *Green v. Swan*, 22 C. P. 307; *Shaw v. Massie*, 21 C. P. 266; *Dredge v. Watson*, 33 U. C. R. 165.

WILSON, J., delivered the judgment of the Court.

It was argued that the plaintiff, by suing in his own right in the declaration, and setting up a title under the assignee in insolvency in the replication, was guilty of a departure in pleading; but the case of *Kitson v. Hardwick*, L. R. 7 C. P. 473, it was admitted by Mr. McCarthy, was adverse to the objection.

The case then turned upon the sufficiency of the replication as amended, and on the second rejoinder.

The replication alleges generally that the assignee, in conformity with the deed of composition and discharge, which was duly executed, by deed transferred the estate of the plaintiff to him before action.

Does that mean that all the requirements of the Act were properly complied with to give the re-investing deed full effect; or, in other words, would the plaintiff, upon a joinder of issue on this replication, be obliged to prove the due performance of and compliance with all the statutory provisions which are necessary to make the deed fully operative?

It must be seen what it is the statute has enacted on the subject.

A deed of composition and discharge duly executed according to the statute is made binding on the non-assenting as well as on the assenting creditors: sec. 94.

The deed may be in such form as the creditors agree upon, and it may contain instructions to the assignee how he is to deal with the estate, "subsequent to the deposit of the deed with him. * * But if such discharge be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the assignee shall immediately resume possession of the entire estate and effects of the insolvent in the state and condition in which they shall then be:" sec. 95.

The re-conveyance by the assignee to the insolvent, if made in conformity with the terms of a deed of composition and discharge, shall have the same effect (except as may be otherwise agreed), "as if such property had been sold by the assignee in the ordinary course, and, after all the preliminary proceedings, notices and formalities herein required for such sale:" sec. 96.

Then it is provided that if the deed of composition and discharge be contested, and any payment of the composition falls due during the contestation, the payment shall be postponed till the contestation is settled: *Ibid.*

By sec. 97, "If the insolvent procures and deposits with the assignee a deed of composition and discharge duly executed as aforesaid, the assignee shall immediately give notice of such deposit by advertisement; and if opposition to such composition and discharge be not made by a creditor within three juridical days after the last publication of such notice, by filing with the assignee a declaration in writing that he objects to such composition and discharge, the assignee shall act upon such deed of composition and discharge according to its terms; but, if opposition be made thereto within the said period, or, if made, be not withdrawn, then he shall abstain from taking any action

upon such deed until the same has been confirmed, as hereinafter provided."

The insolvent, who has procured a consent to his discharge, on the execution of a deed of composition and discharge under the Act, may file in the office of the Court the consent or deed of composition and discharge, and may then give notice of the same being so filed and of his intention to apply by petition to the Judge, on a day named in such notice, for a confirmation of the discharge, which notice shall be by advertisement in the *Gazette* for a month, and also in a newspaper in or nearest the residence of the insolvent; and the creditors may appear and oppose the discharge: sec. 101.

If the insolvent do not deposit such consent or the deed of composition and discharge in the Court, and give notice of his application for a confirmation of discharge, within a month after the consent or discharge has been effected under the Act, and proceed therewith according to his notice, any creditor for \$200 may compel him to bring it in; and, if he fail to bring it in, the discharge shall be annulled without further inquiry, unless further time be given to the insolvent to bring it in: sec. 102.

By sec. 104, until the Judge has confirmed his discharge, the burden of proof of the discharge being completely effected under the Act shall be upon the insolvent.

The composition and discharge may therefore be acted upon by the assignee before there has been any confirmation of the discharge by the Judge.

The insolvent need never, as far as I see, apply for the confirmation at all unless he please to do it: sec. 101; or unless a creditor force him to do it: sec. 102; or unless opposition be made to the composition and discharge under the 97th section, and be not withdrawn. The effect of not having a confirmation is simply to throw upon the debtor, under the 104th section, the burden of proof of the discharge being completely effected under the provisions of this Act.

The plaintiff does not rely upon a confirmation granted

by the Judge, but upon the deed of composition and discharge given by a sufficient number of creditors, and the conveyance of the assignee made under it.

The replication does not shew that all the creditors executed the composition and discharge, and from its terms it must be assumed there were non-assenting creditors.

In such a case, after the insolvent has procured and deposited the deed with the assignee, "the assignee shall immediately give notice of such deposit by advertisement," to enable any "creditor within three juridical days after the last publication of such notice," to file "with the assignee a declaration in writing that he objects to the composition and discharge;" and if no objection be made to it, "the assignee shall act upon such deed of composition and discharge, according to its terms."

But the creditors must have notice of the composition and discharge having been procured and deposited, to enable them to make opposition to it if they desire to do so. For if opposition be made to it within the period, "or if it be made" and it be not withdrawn—which I read as meaning that if opposition be made *and* be not withdrawn—then the assignee shall abstain from taking any action upon such deed until the same has been confirmed as hereinafter provided.

The immediate giving of notice by advertisement of the deposit of the deed is a preliminary to his acting upon the deed. The section says he *shall* do so. The object is to inform creditors who are not assenting parties to the confirmation and discharge, to oppose its being acted upon, and, by their opposition, to force the insolvent to apply for a confirmation of the discharge before the discharge shall be of any value to him; and, when they get him before the Judge, to proceed with him rigorously under the 101st section, and it may be to annul the discharge altogether.

This is a matter of title which it is essential the plaintiff, as the insolvent, who claims from the assignee, should be prepared to prove. The 104th section of the Act says, "the burden of proof of the discharge being completely effected

under the provisions of this Act shall be upon the insolvent." And the 96th section says the reconveyance by the assignee to the insolvent shall, if made in conformity with the terms of the composition and discharge, have the same effect as if the property had been sold by the assignee in the ordinary course "and after" (not and *as if* after) "all the preliminary proceedings, notices and formalities herein required for such sale."

The wording is not very clear. The sentence has not been fully concluded. The words, *have been observed*, or some such expression, have been omitted, and must be understood as coming in at the end of the enactment.

I understand the reading of the clause to be, that a reconveyance to the debtor, if, in accordance with the composition, shall be as valid to him as an ordinary sale to a third person after all the preliminary proceedings, &c., have been taken.

Upon the construction of the Act, we are of opinion it was a condition precedent, and an indispensable preliminary proceeding, to the assignee making the re-conveyance, that he should first have immediately given notice by advertisement of the deposit of the deed of composition and discharge with him; and in the absence of such notice that his re-conveyance is not binding upon the non-assenting creditor of the insolvent, and has not transferred to the plaintiff a valid title to recover the demand now sued for from the defendant.

We think, under the allegation in the replication that the assignee "duly re-conveyed to the plaintiff," that on issue joined upon it the plaintiff would be bound to prove, in the absence of a confirmation by the Judge, that the assignee had immediately on the deposit of the composition and discharge with him given notice by advertisement of the same according to the 97th section, for if there were no such notice, the assignee did *not* duly reconvey to the plaintiff, as alleged.

The replication is not therefore defective on the exception taken to it, because it impliedly asserts that due notice was given.

The second rejoinder, for the same reason, is a good answer to it, and the demurrer to it cannot be sustained.

I refer to *Butler v. Hobson*, 4 Bing. N. C. 290, and to some observations also in *Groves v. McArdle*, 33 U. C. R. 252, on the point of pleading, and also as to the necessity of shewing and proving jurisdiction in bankruptcy proceedings. See also *Lee v. Rowley*, 8 E. & B. 857, and *Allan v. Garratt*, 30 U. C. R. 165, 180.

As to the value and importance of notice in such a case, see *In re Marlborough Club Co.*, L. R. 1 Eq. 216; *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan*, L. R. 6 Eq. 91; *Re Brown's Trusts*, L. R. 5 Eq. 88; *Re Bridport Old Brewery Co.*, L. R. 2 Ch. App. 191; *Lloyd v. Banks*, L. R. 3 Ch. App. 488; *Muskett v. Hill*, 5 Bing. N. C. 694.

The judgment must be for the defendant against the demurrer to the rejoinder.

Judgment for defendant.

PATTERSON v. MCCARTHY.

Insolvent Act of 1869 sec. 59—Operation of executions.

Section 59 of the Insolvent Act of 1869 applies to judgment debts recovered in Division Courts, on which execution has been issued to and the money levied thereunder by a bailiff of such courts, although the section speaks only of executions delivered to *the sheriff*.

It was objected that the defendant received the money only as clerk of the Court, but it appeared that the sale had taken place after the assignment; but *Held*, that there being no lien created by the mere seizure, which took place before the assignment, the plaintiff, as assignee, was entitled to the money as part of the insolvent's estate, no matter in whose hands it might be.

THE declaration was for money payable to the plaintiff, as assignee of Charles McMurray, an insolvent debtor, by the defendant, and for money had and received by the defendant for the use of the plaintiff as assignee. Plea never indebted..

The case was tried before Galt, J., at the Guelph Assizes, in the Fall of 1873.

It appeared from the admissions at the trial that the plaintiff was assignee of one McMurray, an insolvent, under a deed of assignment: that the defendant was Clerk of the Division Court: that at the time of the assignment there were two executions in the Division Court of which the defendant was Clerk, in the hands of the Bailiff of the Court: that a seizure of goods under these executions of the insolvent was made prior to the assignment; that a few days after the assignment the goods seized were sold, and the money realized on the sale paid into the hands of the defendant. The plaintiff demanded payment of those moneys from the defendant. Payment was refused, on the ground that the 59th section of the Insolvent Act of 1869 does not apply to executions in Division Courts, the money being payable to the execution creditors.

The defendant was examined. He stated that he received \$36.72 on the 14th July, 1873, acting as sale clerk to the Bailiff, also \$19.80 on the 13th September, in the same way; that on the 11th October the Bailiff made a return to the defendant of the executions, paying to defendant a balance of \$8.90, and after deducting the costs the balance remaining in the hands of the defendant was \$57.50. It appeared also that the executions expired before the issuing of the writ in this suit, and that defendant told the plaintiff that if he brought him an order from the Judge it would be all right, meaning that he would pay over the money to plaintiff, and that the plaintiff did not produce any order.

At the close of the case the defendant's counsel objected, that the Insolvency Act did not apply to either Division Court Clerks or Bailiffs: that there was no privity between the plaintiff and defendant to entitle the plaintiff to bring this action; and that if the plaintiff was entitled to maintain such an action he could not succeed here, there being no cause of action until after the 11th of October, and this action having been commenced on the 4th of October.

The learned Judge, who tried the case without a jury, entered a verdict for plaintiff for \$57.50, reserving leave to defendant to move.

In Michaelmas Term, *John Paterson* moved accordingly, and obtained a rule *nisi* to enter a nonsuit upon the grounds taken at the trial, or for a new trial.

During last term *Dunbar* shewed cause, and referred to the following cases as having a bearing on the construction of sec. 50: *Mason v. Hamilton* 22 C. P. 411, 415, 419; *Colloden v. McDowell*, 17 U. C. R. 359. As to our right to follow the money, *Marsh v. Kaiting*, 1 Bing. N. C. 198; *Bird v. Peagram*, 13 C. B. 639.

Paterson supported the rule. No privity is shewn; the clerk got the money as bailiff, not as clerk, and so there is no right to sue. The use of the word "Sheriff" shews that the Division Court is not included in section 59, as "Bailiff" would then have been also used. At all events, the suit should be on the Clerk's bond: Consol. Stat. U. C., ch. 19, secs. 24, 25, 185.

MORRISON, J., delivered the judgment of the Court.

The question raised by this rule is, whether the 59th section of the Insolvent Act of 1869—which enacts that "No lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if, before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor shall have been assigned to an interim assignee, or shall have been placed in compulsory liquidation under this act"—applies to judgment debts recovered in Division Courts, upon which execution has issued and money been levied under it by a Bailiff of such Courts; and we are of opinion that it does.

The object and clear intention of the Legislature was to declare that no lien or privilege should be created for the amount of *any* judgment debt by the issuing of an execution thereon, or the levying of money thereunder, if the

estate of the judgment debtor is placed in insolvency before the payment of the money actually levied to the judgment creditor.

It was contended that from the term "Sheriff" being used in the section, it only referred to executions delivered to a sheriff, and that it did not extend to any execution delivered to a bailiff of the Division Court and money levied under it; but we take it that the aim and the policy of the insolvent law were to prevent all judgment debts without exception becoming a lien, if the money recovered was not paid over to the creditor before the debtor's estate was placed in insolvency. That is the material and essential object of the 59th section; the word Sheriff is used only to illustrate the intention of the framers of the provision, viz., the delivery to the proper officer who has the execution of the writ, not to indicate the nature of the judgment debts or the Court out of which the execution issued. If the word Bailiff had been used instead of Sheriff, it could hardly have been contended that the section only applied to executions issued upon Division Court judgments, and not to such as were delivered to Sheriffs.

In explaining a statute we have to consider its object and ascertain its meaning, and it is a rule that the real intention will prevail over the literal sense of terms, so as to carry the object of the Legislature into more complete effect; that an enlarged reasonable interpretation should be given to a word or term, such as Sheriff used here, rather than a confined interpretation which would, to some extent, defeat the very object of the provision. So, we think it only consistent with the whole scope of the Act and the intention of the Legislature, to construe the word Sheriff in this section as including any officer who is entitled to receive and execute writs of execution.

Beyond the general principles laid down for the construction of statutes, I have not been able to put my hand upon any authority except what Lord Coke says: "Sometimes the makers of a statute put the strongest cases, and, by construction, the lesser shall be included. In those cases,

they are put by *way of example* and not as including other things of a similar nature. Thus, in the Statute of Gloucester trespass has been held by construction as put for debt, detinue and covenant; so County Court for Hundred Court, and Court Caron, &c.: *Dwarris* on Statutes, 712; and so I find that the Statute of Westminster, 2, Ch. 18, which gave an *elegit*, said the "Sheriff shall deliver, &c.," "yet, being a beneficial law, by equity it is extended to every other immediate officer to every other Court of Record: 2 Inst. 394, ch. 40.

I have considered the other points raised: that this defendant only received the money in question as clerk of the Court. It is not very clear from the admission and the defendant's evidence in what capacity he did receive, but it is quite apparent he received it with the intention of retaining it and not returning it to the bailiff, but as money levied under the execution, and he did not pretend when it was demanded of him by the plaintiff that he withheld it upon any other ground except that the 59th section of the Insolvent Act did not apply, and that the money belonged to the judgment creditor, who, it does not appear, ever claimed the proceeds of the sale. In fact the money was realized out of goods which, by virtue of the assignment in insolvency, were vested in the plaintiff as assignee, and, rightly speaking, ought to have been handed over to him, as the insolvent debtor whose goods they were was placed in insolvency before the sale, no lien under these circumstances being created by the mere seizure. The plaintiff was therefore entitled to the goods, or the money the proceeds thereof, no matter in whose hands they were, as part of the estate of the insolvent, and the money could be recovered in this action as money had and received for the use of the assignee.

On the argument I thought it hard that this defendant should be subject to this action, but on reflection, if this money was claimed by the judgment creditor, which, as I say, does not appear, the defendant could have interpleaded and so saved himself the expense of an action.

Rule discharged.

BIRCHALL V. REID.

Ejectment—Yearly tenancy—Notice to quit—Disclaimer.

In ejectment the plaintiff and defendant both claimed by their notices under one P. It appeared at the trial that P. sold to the plaintiff in 1868, and that defendant had been living on the premises since 1864, having paid to P's agent about two years' rent in money and repairs. Defendant was not asked at the trial to admit the plaintiff's title.

Held, that a yearly tenancy must clearly be assumed, and that, as no notice to quit was shewn, the plaintiff could not recover.

EJECTMENT, tried before Galt, J., at the Barrie Assizes, in the Fall of 1873, without a jury.

The plaintiff claimed as mortgagee of one Perrin, and under a grant from Perrin. The defendant under a deed from P.

It appeared from the evidence at the trial, that one Perrin was owner of the premises in question, from 1858 to 1868, when he sold them to the plaintiff: that he had possession of the premises through tenants, to whom he rented them: that the defendant at the time he made a deed to the plaintiff was living on the premises, and had done so since 1864, the premises having been rented to the defendant by an agent of Perrin; he paid Perrin no rent, but he had paid some rent to his agent in repairs and some small sums besides.

It also appeared that there had been some negotiation about a sale of the premises by Perrin to the defendant; but that Perrin would not accept the proposition made by defendant.

Perrin's agent stated that he had rented the property on account of Perrin in 1864, and that defendant paid about two years' rent in repairs and money.

Upon the evidence, the counsel for the defendant contended that it appeared that the defendant was a yearly tenant to Perrin; and that the plaintiff should be nonsuited, as defendant was entitled to a notice to quit.

The learned Judge entered a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict or him.

During Michaelmas Term *E. H. Duggan* obtained a rule *nisi* to set aside the verdict, on the ground that the defendant not having set up title as tenant in his notice of title, could not give evidence of a tenancy under Perrin; and that the defendant having put the plaintiff to proof of his title, disputing the same and claiming adversely thereto, could not afterwards claim as tenant.

During this term, *McCarthy*, Q. C., informed the Court that the defendant, his client, had died since the trial.

Duggan, supported his rule. The notice to quit was unnecessary: *Doe d. King's College v. Graham*, 1 U. C. R. 158; *Doe d. Bonter v. Fraser*, 4 O. S. 80; *McCallum v. Boswell*, 15 U. C. R. 343; *Houghton v. Thompson*, 25 U. C. R. 557; *Cleland v. Kelly*, 13 U. C. R. 442.

MORRISON, J., delivered the judgment of the Court.

We very much regret indeed that we cannot see our way to make this rule absolute. When a new trial was granted in this case, upon a former application to set aside the then verdict, we anticipated the plaintiff would be enabled to shew that no yearly tenancy existed, but only a tenancy at will, the defendant having been let into possession under an agreement for sale; but the plaintiff's evidence shews clearly that the defendant was tenant to Mr. Perrin, through whom the plaintiff claims, although the actual terms of the tenancy did not appear, neither party taking the trouble to shew what the terms were, although the agent of Mr. Perrin, who let the premises to the defendant, was called.

As the case presents itself, we cannot help assuming that the terms were such as would constitute a yearly tenancy; and so the defendant would be entitled to the usual notice to quit.

But it was contended that the defendant at the trial having put the plaintiff to prove his title to the premises, he thereby disclaimed to hold under the plaintiff; and having done so, he could not afterwards rely on the want of proof of six months notice to quit; and several cases were cited in support of that view.

Nothing appears in the notes of the learned Judge shewing that the defendant denied the title of the plaintiff, or that he was asked and refused to admit it at the trial.

The plaintiff claimed by his notice through two modes of title, one as mortgagee of Perrin, the other under a grant from Perrin.

The defendant claimed under a deed from Perrin, and appeared and defended for the premises.

Under these circumstances, the plaintiff had to give some evidence to entitle him to a verdict ; he was not the immediate landlord of the defendant, and so he proved title under Perrin, and that the defendant was tenant to the latter.

The defendant called no witnesses, but relied on the want of the six months' notice to quit, being a yearly tenant.

If the plaintiff at the trial had asked the defendant's counsel if he denied the plaintiff's title, he would probably have said he did not. We, therefore, see nothing from which it can be inferred that the defendant disclaimed holding as tenant under Perrin ; and as the evidence clearly shews that the defendant held as tenant, and had paid two years' rent, we have to assume, in the absence of the plaintiff giving any proof the defendant otherwise held, that the defendant was entitled to the regular notice to quit ; and this rule should be discharged.

Rule discharged.

STAPF V. MCCARROW ET AL.

Administration bond—Assignment of—C. S. U. C., ch. 16, secs. 63, 65.

An administration bond having been given to the Surrogate Judge of the United Counties of Huron and Bruce, and the union having been afterwards dissolved—*Held*, under C. S. U. C., ch. 16, secs. 63, 65, that the Judge of the senior county could not order such bond to be assigned, not having been named by the Court of Chancery as the Judge to whose benefit it should enure; and that the plaintiff, suing as assignee under his order, must prove such nomination.

On demurrer to the pleas the defendant raised exceptions to the declaration, of which he had given no notice. The Court, finding such exceptions entitled to prevail, and thinking the pleas bad, gave judgment accordingly, without costs to either party.

DECLARATION: that the defendants, on the 28th of November, 1860, made an administration bond to Robert Cooper, Esquire, then Judge of the Surrogate Court of the then United Counties of Huron and Bruce, who before the assignment of the bond ceased to be Judge. That the condition of the bond was, that the defendant, Mary McCarrow, the administratrix of William McCarrow, should, when lawfully called on, cause to be made a true and perfect inventory of the personal estate, &c., of the deceased &c., and exhibit the same into the registry of the United Counties of Huron and Bruce, &c., and should well and truly administer the same according to law, &c., and should make a just and true account of the same when required by law so to do, &c. Breach: that Mary McCarrow did not well and truly administer the personal estate, &c., of the said William McCarrow, which came into her hands, &c., amounting to, &c. Further breach: that an order or citation was made on the 19th August, 1873, upon the said Mary McCarrow, &c., to exhibit into and leave in the office of the said county, &c., a true, &c., inventory of all the personal estate, &c., of William McCarrow, deceased, and that she did not leave such inventory, &c.; that after such breaches Secker Brough, Esquire, Judge of the Surrogate Court of the County of Huron, ordered that the Registrar of such Court should assign the said bond to the plaintiff, &c., and that said bond was accordingly duly assigned, &c.

Pleas, 1. Non est factum; 2. Plene administravit; 3. That she did exhibit a true, &c., inventory. 4. That the bond was not duly assigned.

The plaintiff took issue on all the pleas, and also demurred to the second plea, on the grounds:—

1. That the plea is no answer to the plaintiff's claim, which is against defendants in their individual capacity; that the plea does not deny that Mary McCarrow had since the death of intestate rights and credits which she ought to have administered; that it does not set up any answer to the *devastavit* complained of in the first breach.

2. That it professes to answer and is pleaded to the whole declaration, and affords an answer to the first breach only, if even to that, and sets up no facts which in law constitute an answer to the second breach. Joinder.

The plaintiff also demurred to the third plea, on the grounds:—

1. That it professes to answer and is pleaded to the whole declaration, whereas it is no answer to the first breach, but is an answer, if at all, to the second breach only.

2. That it sets up no answer in law to the first breach, which it professes to answer; and no facts which in law constitute a defence to the declaration. Joinder.

The cause was tried before Hughes, Co. J., sitting for Galt, J., at the Goderich Assizes, in the fall of 1873.

At the trial the following facts appeared: that the defendant, Mary McCarrow, obtained administration to the estate of her husband, and that she and the other defendants, on the 28th November, 1860, executed the bond in question to Robert Cooper, Esquire, then being the Judge of the Surrogate Court for the United Counties of Huron and Bruce; that Mr. Cooper ceased to be such Judge on the 19th June, 1866, when Secker Brough, Esq., was appointed Surrogate Judge for the United Counties, and that he continued to be such Judge until the 1st of January, 1867, on which day the united counties were separated, and Mr. Brough then became Judge of the Surrogate Court for the County of Huron: that on the 5th of September, 1873, Mr.

Brough, as Surrogate Judge for the County of Huron, on the petition of the plaintiff, ordered the registrar of his court to assign the bond to the plaintiff; and on the same day the bond, under such order, was assigned to the plaintiff, and this action was commenced. It was not shewn that at the time such petition and order to assign was made, Mr. Brough was named by the Court of Chancery as the Surrogate Judge to whom the bond was to enure, under the provisions of section 65, of the Surrogate Act, and the plaintiff's solicitor who obtained the order for the assignment, stated that he had obtained no order making such nomination.

Upon this appearing it was objected, among other things, on the part of the defendants, that the plaintiff could not succeed in this action or sue on the bond, as he had not an assignment of it from the proper authority; and the learned Judge being of that opinion, non-suited the plaintiff, reserving leave to the plaintiff to move to enter a verdict in his favor for \$300.

During Michaelmas Term, 1873, *Robinson*, Q. C., obtained a rule *nisi*, to enter a verdict for the plaintiff accordingly, on the ground that the evidence shewed that the plaintiff was entitled to recover as assignee of the bond.

During the same term, *S. Richards*, Q. C., appeared to support the demurrer to the pleas.

Harrison, Q. C., contra. The defendant does not support the pleas. The declaration however is bad as to the breach that she did not well and truly administer, &c.: *Bell v. Mills*, 25 U. C. R. 508; *Sandrey v. Michell*, 3 B. & S. 405; *Archbishop of Canterbury v. Robertson*, 1 C. & M. 690. The declaration shews that the bond was to a Judge of the United Counties, and the assignment by another Judge of one of the Counties, and does not shew an order of the Court of Chancery.

S. Richards, Q. C., in reply. The exceptions cannot be heard, as no notice of them has been given.

In this term, *Harrison*, Q. C., shewed cause to the rule. The same point arises here that is standing for decision upon the demurrer. The Consol Stat. U. C., ch. 16, sec. 63, applies, and there is no doubt Judge Brough could not make the order, as he had no nomination from the Court of Chancery. The nonsuit was right on the evidence.

Robinson, Q. C.—As to *Sandrey v. Michell*, 3 B. & S. 405, see in our own Courts, *Neil v. McLaughlin*, 19 C. P. 350. The questions are: 1st, are we entitled to sue as assignee; 2nd, on this evidence can we recover. As to the first question, the presumption is, that the Judge acted regularly, and that there was a nomination to him by the Court of Chancery authorizing the order which he made. It was not disproved, and it was not necessary for the plaintiff to prove it in the first instance. But if not, the section in question was only intended to operate as to the Judge of the junior county. Every thing in the senior county could go on as before. The plea is only that the bond was not duly assigned. An assignment in fact was proved, and this supports the declaration. There is no plea that the necessary nomination was not obtained from the Court of Chancery.

MORRISON, J., delivered the judgment of the Court.

The principal question arising on this rule is, whether the plaintiff at the trial established his right to sue and bring this action in his name as the properly authorized assignee of the bond, and we are of opinion that he failed to do so.

By sec. 63, of the Surrogate Court Act, Consol. Stat. U. C., ch. 16, it is provided that the bond to be given by the person to whom administration is committed shall be given to the Judge of the Surrogate Court from which the grant is made, to enure for the benefit of the Judge of such Court for the time being, or in case of the separation of counties, to enure for the benefit of any Judge of a Surrogate Court to be named by the Court of Chancery.

Now, in this case, when the bond was given it was made to Robert Cooper, Esquire, who was then Surrogate Judge

for the United Counties of Huron and Bruce, and who continued to be such Judge to the 19th June, 1866, when Secker Brough, Esquire, was appointed in his stead, Judge of the Surrogate Court for the United Counties.

On the 1st of January, 1867, the United Counties were separated, Mr. Brough remaining, by operation of law, Surrogate Judge of the senior separated County of Huron.

Previous to such separation the bond in question, by force of the statute, enured for his benefit as Surrogate of the United Counties, but after the separation, it is quite clear from the provision in the statute, that the bond thereafter only enured for the benefit of such Surrogate Judge as should be named by the Court of Chancery.

It is to be remarked that the 63rd section does not confine the Court of Chancery to the selection or nomination of some one of the Judges of the Counties so separated, but the Court is to name *any* Judge of a Surrogate Court.

The plaintiff failed to shew that Mr. Brough, as Surrogate of Huron, was so named.

The solicitor for the plaintiff, who presented the petition and obtained the order for the assignment, on his examination stated that he did not obtain any order of the Court of Chancery, or of a Judge thereof, for the assignment of the bond by Mr. Brough, nor was it contended at the trial that the Court of Chancery had named the Judge of the Surrogate Court for the County of Huron, as the Judge for whose benefit the bond was to enure.

Sec. 65 of the Act provides, "That the Surrogate Judge, on motion or petition, on being satisfied that the condition of the administration bond had been broken, may order the Registrar of the Court to assign the bond to some person named in such order, and such person shall be entitled to sue on the bond in his own name," &c.

The Judge referred to in sec. 65, can only mean the Judge for whose benefit the bond enured at the time such order was made, and when the bond was made to or had primarily enured to the Surrogate Judge of the United Counties, as in this case, after their separation the

only Judge then authorized to hear such a motion or application, and make an order for the assignment of such a bond, must be a Judge named by the Court of Chancery. That being the case, in the absence of any such nomination of Mr. Brough, as the Surrogate for whose benefit the bond was to enure, Mr. Brough, as Surrogate of Huron, had no authority to hear or adjudicate upon the petition of the plaintiff, or to order an assignment of the bond to him.

Upon this ground alone the defendants are entitled to our judgment, and it becomes unnecessary to consider the other points raised on the argument of this rule.

On the argument of the demurrer in this cause, the pleas demurred to were given up, and exceptions were taken to the declaration, and the objection was made that notice of the exceptions was not given; yet as the defendants succeeded at the trial, and as we think the declaration was defective, there shall be no costs to either party on the issues at law.

We are not clear that the pleas and issues upon which the defendants succeeded at the trial were, in point of form, well pleaded, but, as the real matter in question, the right or title of the plaintiff to maintain the action under the assignment proved at the trial, was tried, and the defendants have succeeded, if it became necessary we should allow the pleas to be amended.

The rule to set aside the non-suit is discharged, and there will be judgment for the plaintiff on the pleas demurred to, and for the defendants on the exceptions to the declaration. There will be no costs to either party in that respect.

Rule accordingly.

MURRAY V. THOMPSON ET AL.

R. W. Co.—Compensation for land taken—C. S. C., ch. 66, sec. 11, sub-sec. 21—Construction of bond taken under.

The plaintiff owned land required by the Canada Southern R. W. Co., who obtained an order under the Railway Act, C. S. C., ch. 66, sec. 11, sub-sec. 21, for immediate possession, and the defendants became sureties by bond for payment to the plaintiff of the compensation to be awarded within one month after making the award.

The award directed that the Company should within one month pay \$1644 for the land taken, and also the further sum of \$400, unless the said Company should not give to the plaintiff license to remove from off the line of railway, and at any time within five months from the award, the dwelling house occupied by him and standing on the land.

Held, that defendants were not liable for this \$400, their obligation being limited to the sum which might be awarded as compensation for the land and be payable unconditionally within a month.

DECLARATION on a bond made by the defendants to the plaintiff, dated 22nd July, 1871, which recited that the Canada Southern Railway Company required for the purposes of their railway certain lands in the township of Oneida, &c., belonging to the plaintiff, and described in a notice served on the plaintiff, dated 24th July, 1871: that the parties were unable to agree upon the amount of compensation to be allowed to the plaintiff for the lands; that such amount was about to be determined by arbitration in accordance with the statute in that behalf: that immediate possession of the lands was necessary, &c.; and that J. G. Stevenson, Esq., Judge of the County of Haldimand, had required the railway company to give the plaintiff security for the payment of the compensation to be awarded to the plaintiff, in pursuance of the "Railway Act," sec. 11, sub-sec. 21.

The condition of the bond was as follows: "that if the said Canada Southern Railway Company shall well and truly pay to the plaintiff the amount of compensation which shall be awarded by the said arbitration within one month after the making of the said award, with interest from the time at which possession is given to the said Canada Southern Railway Company, and with such costs as may be lawfully payable by the said Company, then this obligation to be void," &c.

The declaration averred, that on the 29th November, 1871, an award was duly made and published by the said arbitration, whereby it was, among other things, awarded, &c., that the said Railway Company should within one month from the publication of the award pay to the plaintiff, \$400, "unless the said Railway Company and all persons lawfully claiming under them should give to said plaintiff, his heirs and assigns, license to remove from off the line of said Railway for his own use, and at any time within five months from such publication of said award, the dwelling house then occupied by him and standing on the lands therein mentioned, and the fruit trees thereon:" that more than five months from the time of the publication of the award had elapsed before this suit; and that the Railway Company did not, nor did any person claiming under them, give to the plaintiff, his heirs or assigns, license to remove from off the line of said railway, for his own use, and at any time within five months from such publication of said award, the dwelling house, &c., nor pay the said \$400.

There was also a common count for money due on the award, &c.

The defendants pleaded—1. *Non est factum*.

2. That the arbitrators did not make and publish any such award, &c., as alleged.

3. That the Railway Company, within one month from the publication of the award, gave the plaintiff license to remove from off the said line of railway for his own use, at any time within five months from the publication of such award, the said dwelling house, &c., and in pursuance of such license the plaintiff did remove from off the line of railway, for his own use, the dwelling house, &c.; and that the company duly performed and fulfilled all the matters, &c., on their part to be performed according to the said award.

4. That after the alleged claim accrued, the plaintiff, by deed, released the railway company and the defendants therefrom.

5. Never indebted., to the second count.

Issues.

The cause was tried at the Fall Assizes of 1873, at Goderich, before Hughes, County Judge of Elgin, sitting for Galt, J.

At the trial, the bond and award were put in. The bond contained the recitals and condition as set out in the declaration.

The award recited that the company required for their railway certain lands in the township of Oneida, containing by admeasurement $10\frac{43}{100}$ acres, as laid down on the map of the said railway, filed in the office of the Clerk of the Peace of the County of Haldimand; and that the plaintiff and the company were unable to agree upon the amount to be paid as compensation for the said land and damages thereto; and it also recited the appointment of the arbitrators and the umpire, &c.; and that they took upon themselves the burden of the said arbitration, &c., examined the land, and took into consideration the value thereof, and the damages aforesaid, and that they were duly sworn, &c.

The award then recited that at a meeting of the arbitrators, it was agreed by and between the plaintiff and the company, and submitted by them to the arbitrators, in the words and figures following:—"It is agreed between the respective parties, that the arbitrators shall proceed to adjudicate and determine the question of compensation and damages, upon the assumption that the company will make an over crossing on the lands of Murray at or near a point marked A on the map; and that the company shall pay that amount within a month after the publication of the award; and that the award shall further provide that, if the company shall fail in constructing such over crossing within a year after the publication of the award, an additional sum, to be fixed by the arbitrators, shall be directed to be paid to Murray within one month after the expiration of such year."

The award then proceeded to recite that a majority of the arbitrators had come to a determination and award of and concerning the same.

Then the award was as follows: That the Canada Southern Railway Company "shall, within one month from the publication hereof, pay to the said George Murray, his heirs, &c., the sum of \$1,644, for the said land so taken as aforesaid, and for the damages aforesaid."

It was then provided that the company should also pay to Murray a sum of \$1,200 in case the company "should not, within the year, build the over crossing or bridge, above referred to."

Then followed:—"And also the further sum of \$400, unless the said company and all persons lawfully claiming under them shall *not* give to such proprietor, his heirs, and assigns, license to remove from off the line of said railway, for his own use, and at any time within five months, from such publication of this award, the dwelling house now occupied by him, and standing on the said above mentioned lands, and the fruit trees thereon."

A good deal of evidence was given at the trial for the purpose of establishing the amount of damages sustained by the non-removal of the house within the five months, the house having been removed by the company in the month of August following, for the plaintiff, who had been living in it all the time and during the five months. •

At the close of the plaintiff's case, several objections were taken by the defendants' counsel against the plaintiff's right to recover; among them, that the defendants were bound by their bond that the company should pay the compensation awarded within one month after the award, and that the sureties were not bound to pay any thing the company were not bound to pay in one month: that the award postponed the payment beyond a month, and the defendants were therefore not liable for the payment awarded; that the award seeks to make the sureties liable for what was not contemplated by the bond.

The learned Judge ruled in favour of the defendants on these and other points, and nonsuited the plaintiff.

During Michaelmas Term, 1873, *Mackelcan* obtained a rule *nisi* to set aside the nonsuit, upon the ground that

there was sufficient evidence to support the plaintiff's case.

During this term, *Robinson*, Q. C., shewed cause. The plaintiff has suffered no damage whatever in his dealing with the railway. He has received both the sum awarded as compensation for the land taken and the sum awarded for the bridge. He has lived in the house continuously up to the time of the trial, and the railway moved his house for him to another part of his farm. He asks \$400, therefore, simply because we did not give him license to remove the house. Reading the award literally, it says the \$400 shall be paid unless the company shall *not* give license to remove," which is equivalent to if they refuse or omit to give it. According to his own assertion, they did omit to give it, and the money therefore is not payable. The defendants, being sureties, are entitled to insist upon a strict construction. The defendants as sureties only bound themselves to pay such sum as the arbitrators might award under the Statute as compensation for the land, and as might be payable in a month after the award. This \$400 now sued for is not awarded as such compensation, and it is not payable for five months. The railway may be bound to pay it, but the sureties clearly are not, for they are only bound to pay for what the railway was bound to pay in a month : *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106.

Mackelcan contra. The Railway Act, sec. 11, sub-sec. 21, allows the land owner no remedy but the bond. He cannot control the arbitration. It was shewn that both parties were present at the argument before the arbitrators. The award was proved as set out in the declaration, and if as sued on and set out and proved it is such as could not be recovered on, it is a ground of demurrer, and not of nonsuit. By the award the license must be given in a month, or the \$400 will be payable. As to the award being conditional, the \$400 was part of the consideration for the land taken, being for the house which formed part of the land. The condition is a mode of escape to the railway

from paying for the house if they did not desire to keep it. The railway cannot object, but the plaintiff might have had cause to object to such a provision. The condition as to notice is separable and may be rejected, and the money be payable in a month as the statute requires: *City of Toronto v. Leake*, 23 U.C.R. 223. The condition is not an improper one: *Turver v. Swainson*, 1 M. & W. 572. A conditional or an alternative award is not necessarily bad: *Russell on Awards*, 4th ed., 264, 421. As to the form of the award: *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106. It makes no difference that the award as to the bridge is bad, for that has been performed. Frequent applications were made to the company for license to remove the house but they were neglected. See also *Re Foster v. Great Western R. W. Co.*, 32 U. C. R. 162, 503; *Spooner v. Payne*, 16 L. J. C. P. 225; *Lumby v. Allday*, 1 C. & J. 301; *Commercial Bank of Canada v. Harris*, 27 U. C. R. 526; *Ryland v. King*, 12 C. P. 207; *Hartley v. Huntley*, 4 C. P. 276; *Adcock v. Wood*, 6 Ex. 814; *Daly v. Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 238; *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520; *Hughes v. Mutual Fire Insurance Co. of the District of Newcastle*, 9 U. C. R. 387.

Robinson, Q. C., in reply: *Miller v. Great Western R. W. Co.*, 13 U. C. R. 582.

MORRISON, J., delivered the judgment of the Court.

This is an action brought against two sureties, who are obligors in a bond entered into under the provisions of the Railway Act, Consol. Stat. C. ch. 66, sec. 11, sub-sec. 21.

Several questions were raised at Nisi Prius and on the argument of the rule, but it seems to me the principal question we have to consider is, whether that portion of the award under which the plaintiff seeks to recover in this action, comes within the terms of the condition of the bond; and in doing so we have to bear in mind that the defendants are mere sureties, and in no way parties to the arbitration.

If upon this point our judgment is adverse to the plaintiff, it then becomes unnecessary to consider the other points raised.

Now the bond recites that the railway company required certain lands, and that the parties were unable to agree upon the amount of compensation to be allowed to the plaintiff for such lands, and that immediate possession of the lands was necessary; and that the Judge of the County Court had required the company to give security for the payment of the compensation to be awarded to the plaintiff, in pursuance of the 21st sub-sec. of the 11th sec. of the Railway Act.

And when we look at that sub-section we find that such Judge may grant a warrant for immediate possession of the lands, upon the company giving security to his satisfaction, &c., "to pay or deposit the compensation to be awarded within one month after the making of the award, with interest from the time at which possession is given, and with such costs as may be lawfully payable by the company."

The condition of this bond follows the words of the statute, and it is clear, we think, beyond doubt, that what the sureties engaged to do was to pay the amount of compensation, *simpliciter*, awarded to be paid by the arbitration, if the company failed to do so within the time prescribed by the Statute, one month after the making of the award. To this one stipulation the condition is restrained, and the responsibility of the defendants limited,

Whatever may have been the object or the intent of the arbitrators in embodying in their award the conditional payment of the \$400 in question, it does not appear by the award to have been awarded as compensation for the lands mentioned in the award itself as being required by the company, but rather as a penalty if the company would not give to the plaintiff a license to remove the house referred to within five months.

Upon examining the award, we find it recites that the land the company required was $10\frac{43}{100}$ acres as laid out

on a map of the railway filed in the office of the Clerk of the Peace, and—after reciting the contents of the bond, and that the plaintiff and the company could not agree on the amount of compensation to be paid for the said land and damages thereto—that a majority of the arbitrators awarded that the company should, within one month, pay to the said plaintiff \$1644 for the *said* land so taken, and for the damages. And then follows a proviso and award as to the building of a bridge within a year under a special agreement recited in the award made between the plaintiff and the company, or in lieu thereof a certain sum mentioned in the award, and which, it appeared, was otherwise arranged for between the parties.

Then the award proceeds, “and also the further sum of \$400, unless the said company, &c., shall not give to such proprietor, &c., license to remove off the line of the said railway for his own use, and at any time within five months from the publication of the award, the dwelling house now occupied by him,” &c.

The award does not say that the \$400 is a sum awarded in compensation for land taken or for damages thereto. The plaintiff, as he sets it out in his declaration, reads it, (I do not say it is the correct reading) that the company should pay to the plaintiff \$400 unless the company would give (leaving out the word “not,”) license, &c.

If the word unless is to be retained, I should read it, by inverting the sentence, “unless the company give license to the plaintiff to remove, &c., the company is to pay to the plaintiff \$400.

However, in the case of sureties we are not bound to enter into inferences, the strict terms of the contract are to be adhered to.

The words used in the recitals, as well as in the Statute, as I have already said, and the whole scope of the condition, are decisive in confining the liability of the defendants to the amount awarded as compensation for the land taken, payable within one month. Any other arrangements, either for compensation or money payable by the company

at longer periods than one month, or contingent upon the performance of something by the company that the parties may have themselves agreed to, or that the arbitrators may have thought or determined the company should do, cannot extend the liability of these defendants beyond the terms of their engagement as assumed in the condition.

There are no words in the bond or condition indicating or providing that the arbitrators may make an alternative or conditional award, or that the defendants should be liable in case the company omitted or refused to perform any other matter or thing other than the payment of the amount of compensation awarded and payable by the company within one month.

If it had been intended that they should otherwise be liable, the recitals and condition of the bond should have contained express language to that effect.

The principal motive inducing these defendants to become sureties, may have been the stipulation that the amount to be awarded was a sum certain to be paid by the company within a month after the award. If they had been requested to become sureties for something to be done or money to be paid at a more remote period than one month, they might have declined. They might not have been willing to be surety for the company paying money or performing some act at a distant period, having confidence in the then present managers of the company and assurances that they had the means at command to relieve them of liability as soon as the amount was ascertained.

Under such circumstances it would be unreasonable to hold that if the arbitrators thought proper, with or without the consent of the plaintiff and the company, to extend the time for payment of the compensation for six months or six years, the sureties during all that time would be burdened with the obligation and unable to free themselves from it.

As I have said before, it would require clear language to warrant our construing or extending the words of the bond beyond their natural import.

On the whole, we are of opinion that this conditional payment of \$400, as awarded by the arbitrators does not come within the intent or meaning of the condition of the bond, and that the defendants are entitled to our judgment, and that the rule should be discharged.

Rule discharged.

HOWE MACHINE COMPANY V. WALKER.

Foreign corporation.

A foreign corporation may sue in this country on a promissory note given to them here for goods furnished by them to the maker.

Review of authorities as to the right of a foreign corporation to contract and carry on business here.

Semble, that they may also under certain circumstances, maintain an action for the breach of an executory contract entered into here in the ordinary course of their business.

APPEAL from the County Court of the County of York.

Action on a promissory note for \$173.29, dated the 2nd of September, 1872, at six months, made by defendant to the plaintiffs.

Pleas: 1. *Non fecit*. 2. Payment.

3. That at the date of the note the plaintiffs were not a corporation having the right to carry on business in Canada as a corporation, and were incapable of contracting or being contracted with in Canada, by reason whereof the plaintiffs have no right to sue the defendant.

4. That since the date of the alleged note, the plaintiffs were not a corporation capable of carrying on business as a corporation in Canada, or of contracting or being contracted with in Canada.

The case was tried in the County Court of the County of York, on the 19th of June, 1873.

From the evidence, it appeared that the note, made at Durham, Ontario, was given on account of the value of sewing machines furnished by the plaintiffs and sold by the defendant as their agent: that the defendant had given and paid at maturity several notes of a similar

character previously; that the defendants were an American company, incorporated in the State of Connecticut; that they had a manufactory at Bridgeport in that State, and that their head office was in New York.

Several objections were taken by defendant's counsel.

The learned County Judge found for the plaintiff for \$175.94, by consent, with leave to move to enter a nonsuit on the ground that the defendant was entitled to succeed on the third plea.

On the 18th of July, 1873, *J. B. Read* obtained a rule in the Court below to set aside the verdict and enter a nonsuit, or a verdict for the defendant, pursuant to leave reserved; or for a new trial, on the ground that the verdict is contrary to law and evidence.

On the 25th of July, 1873, the rule was made absolute for a nonsuit, the learned County Judge being of the opinion that the action was not maintainable. He relied on *Genesee Mutual Insurance Co. v. Westman*, 8 U. C. R. 487; *The Union India Rubber Co. v. Hibbard et al.*, 6 C. P. 77, and *Great Western R. W. Co. v. Preston and Berlin R. W. Co.*, 17 U. C. R. 477.

From this decision the plaintiffs appealed.

The appeal was argued in Michaelmas Term, 1873.

R. A. Harrison, Q. C., for the appellants. The question is raised broadly whether a foreign corporation can do business, or in fact sue on a note in Ontario. The case is one of great importance. In *Westlake's Private International Law*, Ed. 1859, sec. 224, it is said, quoting the language of Judge Denio, in *Bard v. Poole*, 12 N. Y. 504: "As the laws of a country have in general no extra territorial operation, a corporation cannot challenge, as a matter of right, the privilege of dealing in a country not under the jurisdiction of the sovereignty which created it. Any of the States of the Union may, as this (N. Y.) and several of the other States have done, interdict foreign corporations from performing certain single acts, or conducting a particular description

of business, within its jurisdiction. But in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law, and not inconsistent with the policy of the state as indicated by the general scope of its laws or institutions, corporations are permitted by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the Courts of such other states. It is, of course implied that the contract must be one which the foreign corporation is permitted, by its charter to make, and it must also be one which would be valid if made at the same place by a natural person, not a resident of that state."

The law in the United States is laid down in the *Bank of Augusta v. Earle*, 13 Pet. 519, at p. 525, as follows: "It is said that a right to sue and a right to contract are different; that a corporation may sue because it is a person recognized by the laws of Alabama, and may take a stand as a person in the Courts of Alabama. Thus a corporation of Georgia is considered a person in Alabama. It can give a warrant of attorney; for no suit can be sustained without such a warrant. Why is such a right allowed? It is because a corporation is recognized as having a personal existence. How can they sue to enforce a contract and not have a right to make a contract? In principle there can be no difference.."

At p. 538 the language of English Judges is quoted to the effect that "the law of nations, in its full extent, was part of the law of England," and "that the law of nations was to be collected from the practice of different nations, and the authority of writers."

And at p. 588 Chief Justice Taney uses the following language: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only by contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its

creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not, by any means, follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible, yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court. It was so held in the case of *The United State v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmers Bank of Delaware*, 12 Pet. 135. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place? The corporation must, no doubt, shew that the law of its creation gave it authority to make such contracts through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed. Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, expressed or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these states, the

corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and Courts of Justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and it is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that Courts of Justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in *Story's Conflict of Laws*, 37, that 'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of Justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the Courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.'"

The reason and good sense of the rule quoted are apparent. Any other rule would open the door to fraud.

See also *The South Carolina Bank v. Case*, 8 B. & C. 427; *National Bank of St. Charles v. De Bernales*, 1 C. & P. 569; *Dutch West India Co. v. Van Moses*, 1 Str. 612; *Grant on Corporations*, 14, 50; *The Carron Iron Co. Proprietors v. Maclaren*, 5 H. L. 416; *Story's Conflict of Laws*, 7th ed., sec. 565; *Silver Lake Bank v. North*, 4 Johns. Chy. 370; *Abbott's National Digest* 'Foreign Corporations,' vol. ii., p. 535; *Warren Manufacturing*

Co. v. Aetna Insurance Co., 2 Paine 501; *Bard v. Poole*, 12 N. Y. 495; *Runyan v. Coster*, 14 Pet. 122; *Lafayette Insurance Co. v. French*, 18 How. 404. In Lower Canada the law is found in the case of *Larocque v. The Franklin County Bank*, 8 L. C. 328; *Comstock v. Connecticut R. W. Co.*, Rev. L. C. 589.

The cases relied on by the Judge below, do not support his judgment. In *The Bank of Montreal v. Bethune*, 4 O.S. 341, it was held the bank could not sue on a note made in Upper Canada, but that was on the ground that the bank was not a trading corporation. See also *Genesee Mutual Insurance Co. v. Westman*, 8 U. C. R. 487; *Union India Rubber Co. v. Hibbard et al.*, 6 C. P. 77; *Washington County Mutual Insurance Co. v. Henderson*, 6 C. P. 146. [WILSON, J., referred to *Newby v. VonOppen and the Colt's Patent Fire-arms Manufacturing Co.*, L. R. 7 Q. B. 293.]

M. C. Cameron, Q. C., contra. At first sight it might seem that to support the verdict was inflicting a hardship on the plaintiffs, but, in fact, it would be setting aside our laws as to corporations to allow foreign corporations to deal here as our own. Our companies are incorporated on the understanding that their members are personally liable in time of need. To allow this appeal would be to give foreign corporations all the privileges of ours, without the protection which our citizens ought to have, and have as to our own companies. The case of *The Bank of Montreal v. Bethune*, 4. O. S. 341, has not been doubted in any subsequent case, and should be followed. See also *McPherson v. McMillan*, 3 U. C. R. 30; *Mackereth v. Glasgow & South Western R. W. Co.*, L. R. 8 Ex. 149.

RICHARDS, C. J.—As the matter arising on this appeal is of great practical importance, I shall make lengthy extracts from the more important decided cases in which questions raised here or analogous ones have come up.

In *Alivon et al. v. Furnival*, 1 Cr. M. & R. 271, Baron Parke, in giving judgment, referred to the right of two out of three syndics in France to sue and recover debts in their

own name, and said, at page 296 : " This is a peculiar right of action, created by the law of that country ; and we think it may by the comity of nations be enforced in this, as much as the rights of foreign assignees or curators or foreign corporations appointed or created in a different way from that which the law of this country requires : *Dutch West India Co. v. Van Moses*, 2 Lord Raym. 1552, 1 Str. 612 ; *National Bank of St. Charles v. De Bernales*, 1 Ry. & M. 190, S. C. 1 C. & P. 569 ; *Solomons v. Ross*, 1 H. Bl. 131.

In *The National Bank of St. Charles v. De Bernales*, the defendant was the agent of the bank residing in London, and he acknowledged by letters to have received several bills of exchange on account of the directors, the proceeds of which it was proved he received on maturity, to the amount of £20,204. The plaintiff recovered.

Chief Justice Taney, in his judgment in *The Bank of Augusta v. Earle*, 13 Pet. at p. 588, says, among other things : " It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law ; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places ; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible ; yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court. It was so held in the cases of the *United States v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmers' Bank of Delaware*, 12 Pet. 135.

" Now, natural persons through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally

present when the contract is made ; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside ; provided such contracts are permitted to be made by them by the laws of the place ?

“ The corporation must, no doubt, shew that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of that place to exercise the powers with which it is endowed.” * *

“ Adopting as we do the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction, and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests.

“ It is nothing more than the admission of the existence of an artificial person, created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state.

“ In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its Courts ; since the case of *Henriques v. The Dutch West India Co.*, 2 Lord Raym. 1532, decided in 1729 (a). And it is a matter of history which the Courts are bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts,

(a) The same case is reported in Str. 612 as *Dutch West India Co. v. Van Moses*.

and we have never seen a doubt suggested there of the validity of these contracts by any Court or any jurist."

"It is impossible to imagine that any Court in the United States would refuse to execute a contract by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created are void, even contracts of that description could not be enforced."

Sir J. B. Robinson, in *Genesee Mutual Insurance Co. v. Westman*, 8 U. C. R. 495, refers to the *Bank of Augusta v. Earle*, and states that his confidence in that decision is somewhat lessened by observing how undue a stress is laid in it upon the case of the *Dutch West India Co. v. Van Moses* which he adds "really does not touch the question of the validity of the contract, but determines nothing more than that a remedy may be had in England upon a contract made in Holland, by a corporation competent to make such a contract there, and when, consequently, the question was not about the validity of the contract, which was on no account doubtful, but upon the legality of even allowing it to be enforced in an English Court of Justice. It seems also as if in the judgment to which I refer that this distinction had been overlooked, which seems undeniable and obvious,—namely, that an individual, generally speaking, can go into a foreign country in time of peace and make a contract there, and when he sends an agent to do this in his stead he is only authorizing another to do an act for him which he would clearly be competent to do in his own person. The foreign corporation, on the other hand, cannot migrate from its proper locality; and, therefore, in sending an agent to contract for them in another country, they are assuming to do by deputy what they could not do themselves. There seems to be a fallacy in overlooking that difference."

There is no doubt that the grounds on which the case of the *Genesee Mutual Insurance Co. v. Westman*, were decided do not necessarily determine that the plaintiffs' action will not lie here, though the tenor of the observations of the learned Chief Justice was in that direction.

He said, at p. 497, "It will be observed that a decision against the plaintiffs in this action does not necessarily establish that a foreign corporation, by which we mean a corporation created in any country whose laws do not bind us, can, under its foreign charter, assume to act as a corporate body here, in making contracts and transacting business even of such a description as the charter contemplates; though at present, I must say, I know of no authority of the English Courts, or of our own, under which we could hold that it may."

Mr. Justice Burns, in his judgment, said, at p. 499, "This case by no means, according to my view of it, depends upon the abstract question of whether a foreign corporation can sue in our Courts, nor whether the object of the suit is merely to reduce the assets of the institution to possession. If it did, then, I should be of opinion, our Courts of law would lend their assistance for that purpose. * * *

This is not the case of a banking institution suing to recover a debt due to it, or that of a corporation suing on an ordinary contract, which has been broken and for the breach of which compensation is sought upon the agreement; but it is a contract of a positive nature, where the one party is entitled to privileges and liens upon property, as the consideration for entering into certain engagements and obligations; and therefore the case calls for investigation, whether both parties stand upon an equal footing."

The effect of the decision in that case was, that from the nature of its charter the plaintiffs could not properly carry on business in this country or give or receive the security here which was necessary to enable it successfully to carry on its business, and that it could never have been intended by its charter that its business should be carried on here.

In *Union India Rubber Co. v. Hibbard et al.*, 6 C. P., Draper, C. J., said, at p. 81, "It appears to me a startling proposition, at first sight, that the defendants can purchase and receive plaintiffs' goods, in Upper Canada, and when asked to pay for them can justify their refusal by saying,

‘You are a foreign corporation for the sale of goods in the United States, and you have no right to send those goods for sale into Upper Canada, where I bought them.’ It cannot be denied, if the defendants had written to the plaintiffs at their place of business, ordering goods, and they had, in consequence of that order, sent them, the defendants would have been liable in an action brought by the plaintiffs in our Courts, and might have been liable, according to the terms of their order, though the goods had not, in fact, ever come to hand. As it is, the plaintiffs sue, not to enforce a positive contract and express promise made by defendants, being their part of a transaction entered into by the plaintiffs and defendants in this Province, but upon the implied promise resulting by our law from the fact that they had received and used the plaintiff’s goods. The defence, in plain words, is, ‘You had no right to sell goods in Upper Canada, and because I bought and received them there I am not bound to pay for them.’ There is nothing in the transaction that violates any positive law of Upper Canada, for there is no law to prevent a foreign corporation sending its goods, to Upper Canada to be sold there, nor could it be said to be an evasion or fraud of any laws, nor against either public rights or public policy; neither is there anything in the subject matter of the contract which relates *locally* to Upper Canada. The whole rests on a technical difficulty, or objection to the capacity of the plaintiffs to make a binding contract in Upper Canada.”

In *Newby v. Von Oppen and the Colt's Patent Fire-Arms Manufacturing Co.*, L. R. 7 Q. B. 293, Blackburn said, “We take them (the facts) to be as follows: The Colt’s Patent Fire-arms Manufacturing Company is not an English corporation; it is an American company, incorporated by American law; but this foreign corporation has a place of business in England, and there *de facto* carries on business just as an English corporation might do, though their proper place of business and head office is in America. The contract which the plaintiff alleges to have been broken was, as he alleges, made in England by the foreign

corporation thus carrying on business here. The writ was served on the manager of their business in England, who appears to be the head officer of their English branch, and indeed the only officer, but who certainly was not the head officer of the American corporation in the United States. Two points were raised and argued before us, and it was said that a foreign corporation can not be sued as defendants in an English Court at all."

His Lordship then referred to the decisions allowing foreign corporations to sue in England, and proceeds, on p. 295, "It is true that we are not aware of any reported case in which a foreign corporation has been sued in a Court of law, but it seems to follow, from their being permitted to sue as plaintiffs, they must be suable as defendants."

The learned Judge then referred to the question as to the proper officer to be served with process. He considered that it was shewn that the defendants were carrying on trade themselves in London, and were to be treated as resident there, and process was properly served by being served on the head officer of the English branch; and he proceeded:

"It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction. * * This would be so, if the foreign company had merely employed an agent here, who made a contract for them; but we think it is different when the foreign corporation actually has a place of business and trades in this country. This is a point of very considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see from this case that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such a corporation does, for many purposes, reside both in England and its own country."

There is no suggestion in that case that the corporation being a foreign one could not enter into a contract in England. The whole argument and proceeding goes on a contrary view. The real difficulty suggested in the case is as

to the manner of serving the process on the defendants. The facts are so plainly stated that the plaintiffs were suing on a contract made with the foreign corporation in England, that if it had been doubted that the foreign corporation could make a contract in England, so astute a lawyer as Mr. Justice Blackburn would not fail to have referred to it.

In the *Welland Railway Co. v. Blake*, 30 L. J. Ex. 161, (1861), an action by a Canadian railway company, chartered under the authority of a Canadian Act of Parliament, and, therefore, as to England, like a foreign corporation, to recover calls—the stock probably being subscribed in England—no point was taken that the plaintiffs could not sue on these calls, because the contract was made in England. The suit was defended on substantial grounds, and if the able lawyers concerned in it thought the suggested objection would have been valid it would probably have been taken. *Montague Smith*, Q. C., and *Merewether* shewed cause against the rule for the defendants, and *Bovill*, Q. C.; afterwards Chief Justice of the Common Pleas, was for the plaintiffs.

In the action of the same plaintiffs against *Burns*, *Ib.* 163, the present Mr. Justice Lush was counsel for the defendant, and *Bovill*, Q. C., for the plaintiff.

As to the decided cases they seem to be to the following effect.

The Bank of Montreal v. Bethune, 4 O. S. 405, decides that a foreign banking corporation could not recover on promissory notes discounted by them in carrying on their business in Upper Canada as bankers. But they could recover for the money paid over to the defendant by the agent in discounting his own note as for money had and received to their use. This recovery, as is said by Draper, C. J., in the case cited from 6 C. P., at p. 83, must have rested on the promise implied by law to repay the plaintiffs that money, though the whole transaction, viz., the advance and the consideration for the advance, arose in Upper Canada.

The case of the *Genesee Mutual Insurance Co. v. West-*

man was decided on the express ground that the objects and scope of the corporation, and the way its business was to be carried out were such that it could not carry on business in Upper Canada so as to receive the notes of parties insured, and hold them for the purpose of making calls to raise a fund to satisfy losses.

In the case of the *Union India Rubber Co. v. Hibbard et al.*, 6 C. P. 77, it was decided that the plaintiffs could recover for the balance due on an account stated in Upper Canada, if such accounting was concerning dealings which occurred in the foreign country, when the rights of the corporation to be a party to such dealings could not be denied; and the leaning of the learned Chief Justice in that case evidently was that the plaintiffs could recover for goods sold and delivered when the consideration was executed for them, the sale and acceptance being admitted an implied promise to pay arises as much as in an action for money had and received.

The later English cases to which I have referred seem to me to go in the direction of holding that these plaintiffs may recover in this action.

We are, according to the decisions of the Courts in England, called upon by the comity of nations so far to recognize the acts of foreign states as to admit to sue in our Courts the bodies created by them, such as corporations, trustees, &c., and to enforce the contracts made with and transferred to them, if made and done according to the law in their own country.

I think the cases in the English Courts, as well as our own, go further, and hold that where the money of a foreign corporation gets into the hands of a person in this country, our Courts will aid the foreign corporation in suing him for the money in their corporate name here.

Suppose a foreign trading and manufacturing corporation, created by the Legislature of Michigan, were to order a quantity of iron from a merchant in Montreal, and it was delivered to the Grand Trunk Railway, to be forwarded to Detroit, and at Sarnia a rival in business obtained possession of it by fraud and sold it, the decided cases go to the

extent of holding, I think, that the Michigan corporation might sue the person here who sold the property and received the money for it in assumpsit, for the law would imply a promise to pay.

Suppose the order had been to a merchant here, by a letter written from and mailed at Detroit, and the money had been sent, and the merchant, instead of sending the article ordered, sent an inferior article not worth the price of the kind ordered, and the defendant did so fraudulently, and suppose the plaintiffs had not knowledge of the fraud until it was too late to rescind the contract—if sued for damages for the breach of the contract could the defendant, resident here, successfully contend in our Courts that he was not liable? The contract, if express, would be considered as made here, because the plaintiffs sent their letter here to make the contract, and if it is an implied contract the implication arises here, where the money was received and the fraud perpetrated.

In this case it would be grossly unjust to allow a defendant here, in our Courts, to set up as a defence that the plaintiffs being a foreign corporation could not recover, and the effect of such decisions would be to discourage trade and commerce, which would be contrary to the policy of our people, and of the nation from which we sprang.

To sustain this action it is not necessary to decide that a foreign trading corporation could maintain an action for the breach of an executory contract entered into here in the ordinary course of its business, though I am inclined to think they could do so under certain circumstances. All that is necessary to decide, under the facts shewn in this case, is, that a defendant may be liable on a promise to pay for the goods of the plaintiffs, which he has obtained from them rightfully or wrongfully, and which after he has obtained and disposed of he has made a promise to pay for.

The cases already decided in our own Courts seem to sustain the principle that the plaintiffs could recover on the implied promise to pay for these goods, as well as on an implied promise from the receipt of money to repay it on failure of the consideration for which it was paid.

If the plaintiffs can recover on an implied promise, they can surely recover on an express promise ; and a promissory note seems to me no more than an express promise in writing to pay the plaintiffs the money which by it the defendant admits he owes, and the facts shew a good consideration for the admission and promise in this case.

It would be against the first principles of justice to hold that the defendant might keep the property which clearly belonged to the plaintiffs, and which he obtained from them on a promise to pay for it, and which he has disposed of for his own benefit, and then turn upon the plaintiffs and say, "You cannot recover for the value of your property, because you are a foreign corporation."

Before coming to such a conclusion, I should require some express legal enactment to compel me to do so, or some express decision of the Courts, which I would consider binding. I have no knowledge of an enactment on the subject requiring the kind of decision referred to, and the decided cases to which I have referred seem to me to warrant a contrary conclusion.

The case of the *Bank of Augusta v. Earle*, 13 Pet. 519, already referred to, was argued in the Supreme Court of the United States by some of the ablest lawyers in America, including the late Daniel Webster ; and the decision of Chief Justice Taney, a very able Judge, has been followed in many of the State Courts ; and I think it is now the settled law in most of the States of the Union, that foreign corporations may sue in their Courts on contracts made in another state than that by the legislature of which the corporation was created.

I have quoted the remarks of Sir John Robinson on some parts of that judgment, and no doubt he shews that the illustration referred to, of an individual residing in a foreign state contracting here through an agent, is not necessarily like a corporation doing the same thing, for the individual can come here personally and contract, but the corporation, as a *person*, cannot travel here. I think, however, with due submission to the opinion of so eminent a Judge, that

the doctrine enunciated in the decided cases in our own Courts, and in the later cases in England, shew that on a promise to pay on an executed consideration an action may be maintained by a foreign corporation here, though the consideration may have arisen on a transaction wholly entered into by the foreign corporation in this country.

In *Angell & Ames*, on Corporations, 9th ed., sec. 372, the rule of law is thus summed up: "Indeed, it may in England be deemed well settled, that after it has been proved, like any other matter of fact, that an association of persons, who bring a suit in any foreign Court by a corporate name, have been incorporated, there is no reason why their suit should not be sustained, than there is why the suit of a natural individual, who is a foreigner, should not be. A corporation established by a statute in Great Britain may bring an action in one of the state Courts of this country: *British American Land Co. v. Ames*, 6 Met. 391."

In *Bard v. Poole*, 12 N. Y., Mr. Justice Denio thus sums up the law applicable to this subject, at p. 504: "They (corporations) are beings existing only in contemplation of law, and have no other attributes than such as the law confers upon them; and as the laws of a country have in general no extra territorial operation, a corporation cannot challenge, as a matter of right, the privilege of dealing in a country not under the jurisdiction of the sovereignty which created it. Any of the states of the Union may, as this and several other states have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law, and not inconsistent with the policy of the state as indicated by the general scope of the laws or institutions, corporations are permitted, by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the Courts of such other states. It is,

of course, implied that the contract must be one which the foreign corporation is permitted, by its charter, to make ; and it must be one which would be valid if made at the same place by a natural person, not a resident of that state. *Silver Lake Bank v. North*, 4 John. Ch. 370 ; *Bank of Augusta v. Earle*, 13 Pet. 519 ; *Mumford v. American Life Insurance and Trust Co.*, 4 Comst. 463.

Mr. *Westlake*, in his work on International Law, at sec. 224, cites the above judgment."

It seems to me the above extract lays down rules of decision that may be well followed in relation to cases of this sort.

It is not pretended that the transaction out of which this action arose was not such as the corporation might enter into as being within the scope of their charter, or that the selling the goods in this province and taking a promissory note for them, is, in any way, contrary to any enactment made by our Legislature, or contrary to the general policy of our laws or the interests of the people of this province, as indicated by legislation.

It is difficult to see how the pleas can properly be construed as shewing any answer to the plaintiffs' claim as sued for.

The third plea is, that at the time of the date of the note the plaintiffs were not a corporation having the right to carry on business in Canada as a corporation, and were incapable of contracting or being contracted with in Canada, by reason whereof the plaintiffs have no right to sue the defendant.

The fourth plea is to the same effect, viz., that since the date of the note the plaintiffs were not a corporation capable of carrying on business as a corporation in Canada, or of contracting or being contracted with in Canada, by reason whereof the plaintiffs have no right to sue the defendant.

If it be admitted, as I assume it must be, that making a promissory note by the defendant is entering into a contract by the defendant with the plaintiffs to pay a certain

sum of money, then, admitting that the plaintiffs are incapable of carrying on business as a corporation in Canada, yet, according to the effect of the decided cases, if a person resident in Canada had gone to the United States and made purchases there, he might, on an adjustment of their accounts here, contract or agree to pay them the balance due, so to that extent they were capable of being contracted with in Canada.

I do not consider that any decided case conflicts with the decision we have arrived at, but that the principles on which those cases are decided fully warrant the conclusion to which we have come.

The appeal will be allowed, and the rule to enter a nonsuit in the Court below will be discharged with costs. There will be no costs to either party of this appeal.

MORRISON, J., concurred.

WILSON, J.—Independently of the objections there are to the pleas, which do not shew the promissory note was made in this province; or, if made here, that the consideration for it arose here; or, that the plaintiffs ever carried on business here or contracted here; the substantial ground which the defendant argued entirely fails.

I quite agree with the Chief Justice in the opinion he has expressed. In my opinion there is no such law that a foreign corporation cannot carry on business here, and sue and be sued in respect of their contracts which are made here.

Our own corporations have been sued both in England and the United States, and they have been plaintiffs in England also.

If the law were as the defendant has argued, it would put a stop to the whole railway enterprise on this continent, for there is, perhaps, not a company, of any consequence, either in the Dominion or in the United States, which has not borrowed capital in England, and bought iron and other materials for their works.

And foreign governments have sued and been sued repeatedly in the English Courts.

Such a defence, if successful, would affect insurance companies, but a provision is made with respect to them by statute, and various loan and investment societies, and would hamper if not ruin business of every kind, especially transactions of magnitude, where we are obliged to resort to a wealthier country than our own for the pecuniary aid which we have not among ourselves.

I do not see any difference between a foreign corporation making a sewing machine here and selling it here; or making it abroad and only selling it here; or between either of these cases, and a foreign corporation borrowing money here; or, for that matter, both lending and borrowing. There may as well be a lending of money here, as a lending or selling of goods and chattels here; and I think it is the commonest kind of business transaction for a corporation to buy and sell and trade in other countries to which their charters do not extend.

I can only say I agree in the judgment which has been delivered (a).

Appeal allowed without costs.

(a) See also *Lindley on Partnership*, 3rd ed., vol. ii., 1515, 1516, where the cases are collected and the Canadian cases are reviewed.

CLARKE V. GRAND TRUNK R. W. CO.

*R. W. Co.—Right to possession of land not paid for—14 & 15 Vic., ch. 51,
18 Vic., ch. 33—Eviction of their tenant by the owners.*

In 1858 the defendants, a Railway Company, requiring lands for their station and grounds, fenced it in with the consent of the proprietor, M, but the amount to be paid for it was, for some reason, not agreed upon. Defendants, however, occupied it until 1866, when they leased a small portion of it to the plaintiff for the purpose of a warehouse, and in 1868 M., not having been paid for the land, put up a fence, which interfered with the plaintiff's enjoyment. The plaintiff thereupon sued defendants on the covenant in the lease for quiet possession.

Held, that he could not recover, for M. could not have dispossessed the defendants, his right to the land having been by the statutes converted into a claim to compensation, and the eviction, therefore, if there was one, was not by title paramount.

DECLARATION on a covenant in a lease for quiet possession; breach, eviction by superior title of one Moore.

Pleas: 1. Non est factum.

2. That Moore did not enter and evict.

3. That Moore had no title to the premises.

4. That the defendants are a railway company, &c., and were entitled, &c., to take and occupy, for the purposes of their railway, lands, including those in the declaration mentioned: that they complied with all the requisites of the several statutes, &c., and took possession of the lands mentioned; and while they were in possession thereof, and for the erection of storehouses for storing goods carried and to be carried upon the railway, the defendants gave by the deed in the declaration mentioned a lease to the plaintiff, &c., at a small rent: that the plaintiff built the storehouse and occupied the same, and from thence, &c., and at the commencement of this suit, still occupied and was in possession of the premises as tenant thereof to the defendants, &c., and paid the rent since the time of the alleged eviction, and the taxes thereon, and still occupies and possesses the premises and every part thereof as tenant of the defendants; and that the defendants at the time of the making the lease were in possession of the premises, and up to and at the commencement of this suit were, under the several statutes in that behalf, and are, subject to the said

lease, entitled to the possession of said premises, and the said Moore was not at or since the date of the deed entitled to the possession of said lands, or to eject or evict the plaintiff therefrom.

Issue.

The cause was tried at the Spring Assizes of 1873, before Gwynne, J., at Guelph.

Upon the trial the lease in question was put in, dated 8th February, 1866, from defendants to the plaintiff, for a term of years, of the premises in question, being two parcels marked in a diagram attached to the deed to the railway and being part of the company's lands at one of their stations called Rockwood station.

By one of the provisions in the lease the plaintiff was to erect a warehouse for storing grain, &c., on the premises within one year. It contained a covenant that the plaintiff should have quiet possession of the premises.

The plaintiff was examined, and he stated, that he had peaceable possession of the premises until 1868, when he was kept out of possession of part of the premises by Moore putting up a fence, which remained up until the fall of 1870, and which prevented his access to the public road: that he was not actually put out of the building, but only his access to it was interfered with, and that he did not use the storehouse, which was a part of the demised premises, after Moore put up the fence: that in 1870 he got permission from Moore so that he had communication between the road and the rear of his storehouse, which had a door in the rear, and that he paid no rent while he was thus shut out.

Moore was called by the plaintiff, and stated that being in possession of the lot and owner of the land when the railway was first laid out, he conveyed to the defendants the right of way, 90 feet: that some years ago the company's engineer laid out what the company required for station grounds by his permission: that he told him the company would have to pay for it: that he said of course they would satisfy him for it, and that they fenced it in, and

that they afterwards put the plaintiff and one T. in possession of part of the station grounds. Moore also stated that his object in putting up the fence complained of by the plaintiff was to make the defendants pay him for the station grounds; that they, the defendants, having occupied the station grounds which they had laid out and agreed to take from him, the witness, for the purposes of the company, and not having paid him for it, he put up the fence which it was alleged interfered with the peaceable enjoyment of part of the demised premises. He also stated that as he did not wish to turn out the plaintiff, or do him any harm, he gave him permission to take down part of the fence.

Mr. Strange, from whom Moore purchased the farm, was called by the plaintiff. He proved that Moore had executed a bond to give grounds for a station: that he, witness, acted for the defendants to purchase the lands in question from him for that purpose: that he tried to get it as a gift from Moore; this was in 1858: that Moore refused to give the lands as a gift; that under instructions from Mr. Shanly, the manager of defendants' railway he fenced the station grounds in: that before doing so he asked permission of Moore: that he tried to get a deed from Moore in 1858, but did not get one: that some time (about six months) before the commencement of this action, Moore conveyed the station ground lands in question to the defendants.

At the close of the plaintiff's case the defendants' counsel submitted that there was no evidence of eviction by paramount authority: that if Moore did, as alleged, evict the plaintiff, he had no right or title to do so, Moore's claim under the circumstances being merely one to compensation for the lands occupied by the company: that the company were lawfully in possession of the land upon an agreement with Moore to pay for the station grounds, and so Moore could not evict the plaintiff, his claim in respect of the lands being converted into one for compensation only under the provisions of the statutes.

The learned Judge was of opinion that there was no

eviction : that if the 18 Vic. ch. 33, sec. 29, applied to the case there was clear evidence that the defendants were lawfully in possession by verbal authority of Moore, under an agreement that he was to be paid for the lands, the sum not being then ascertained, but to be ascertained in due course of law ; and he reserved leave to the defendants to move to enter a nonsuit, leaving the case to the jury, to say whether, in fact, the plaintiff's enjoyment of the land was interfered with by Moore at all between the spring of 1868 and the fall of 1870, and if that was their opinion to say the amount of damage.

The jury found for the plaintiff and \$80 damages.

During Easter Term. 1873, *M. C. Cameron*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection.

In Hilary Term, 1874, *C. S. Patterson*, Q. C., shewed cause. There was only some arrangement between the company and Moore that the latter should be paid—there was nothing done under the Statute to bind the railway to take the land. The question is, under these circumstances, could Moore have ejected the defendants. If he could the action is well brought. He referred to 18 Vic., ch. 33, sec. 29. No legal process is necessary to make an eviction : *Rawle* on Covenants, 4th ed., 151 ; *Ludwell v. Newman*, 6 T. R. 458. If Moore had a right to take possession and did so, that was an eviction. There was an eviction in fact.

M. C. Cameron, Q. C., contra. The defendants went into possession by Moore's consent. They had been in possession ten years and let it to several parties. The claim of Moore had been converted by the Statute into one for compensation only, and there was, therefore, no eviction by title paramount : *The Corporation of the County of Buffalo and Lake Huron R. W. Co.*, 31 U. C. R. 539 ; *McLean v. The Great Western R. W. Co.*, 33 U. C. R. 198.

MORRISON, J., delivered the judgment of the Court.

Without expressing any opinion as to there being evidence of eviction assuming that Moore had a title paramount to the defendants, we are of opinion that the plaintiff failed to establish a case entitling him to recover

The facts of the case are shortly these. In 1858 the defendants required the land in question for a station ground for their railway. Moore, the then owner and occupier of the lot of which it formed part, was applied to for the land for that purpose, it appearing also that he had executed a bond to give land for a station, which we may assume was at an earlier period. The company by their officers laid out the land so required, and had it fenced in, all this being done with the consent and permission of Moore, and upon the understanding that he was to be paid for such land. For some reason or other, the amount of the compensation was not at the time agreed upon or ascertained; the company in the meantime possessed, occupied and used the land for the station purposes.

In 1866 the defendants leased a small piece of it to the plaintiff for the purpose of a warehouse for storing grain, &c.. In 1868, Moore, according to his own statement, not having received any compensation for the land, put up the fence which it is alleged interfered with the enjoyment of the plaintiff's demised premises, with the object of coercing the defendants to pay him, Moore, for the land, and maintained the fence for some time; and apparently he succeeded in his object, as he afterwards was paid for it, and he conveyed it by deed to the defendants.

The question is whether, under these facts and circumstances, the plaintiff can maintain this action.

We have had to consider very recently the effect of the various statutes authorizing the taking of lands by railway companies in the case of *McLean v. Great Western R. W. Co.*, 33 U. C. R. 198, and the conclusion we arrived at was that the company cannot be disturbed in their possession of the land taken and occupied by them for the purposes of their railway when the owner of the land has not been

paid for it, and even where it was taken without his consent, and that the only remedy he has is that of looking to the company for compensation under the provision of the statutes. The statutes applying to these defendants, as well as to the Toronto and Guelph Company, which was amalgamated with the Grand Trunk Company—this station being one on that part of this railway—are those contained in the Railway Clauses Consolidation Act, 14 & 15 Vic. ch. 51, and 18 Vic. ch. 33.

It is not necessary to refer to all the various sections of the statutes. Sec. 4 of ch. 51, 14 & 15 Vic. provides “that the power given by the special Act to construct the railway and to take lands for that purpose shall be exercised subject to the provisions and restrictions contained in this Act, and compensation shall be made to the owners and occupiers of * * any such lands so taken * * for the value and for all damages sustained by reason of such exercise as regards such lands * * ; and except where otherwise provided by this Act or the special Act the amount of such compensation shall be ascertained and determined in the manner provided by this Act.”

And by sub-secs. 12 and 13, sec. 9, under the head of “POWERS,” the company is authorized “to enter into lands of Her Majesty without previous license therefor, or of any corporation or person whatsoever lying in the intended route or line of the railway; and to make surveys, * * and to set out and ascertain such parts of the lands as shall be necessary and proper for the railway.”

Provision is made authorizing agreements to be made between the parties, touching the lands and the compensation, as well as the mode of compensation, and in case of disagreement the mode in which compensation shall be settled. And by sec. 29 of 18 Vic. ch. 33, which is an Act entitled “An Act to amend the Acts relating to the Grand Trunk Railway Company of Canada,” which after providing as to actions of ejectment, and other actions against these defendants a mode, by the payment of money into Court in certain cases by which all pro-

ceedings may be stayed, it further provides, at the end of the section, that "in no case shall the said company be adjudged to give up possession of any such lands, of which they have once lawfully obtained possession, and the claims to or upon them shall be by such possession converted into a claim for compensation to or upon the sum aforesaid."

The whole object and scope of the various statutes, and for very obvious reasons, being to convert the right to such lands into a compensation or money claim instead of the land itself.

That these defendants lawfully obtained possession, and continued for years until the alleged eviction, is beyond doubt. That being the case, Moore, as the Court held in *McLean v. The Great Western R. W. Co.*, could not have dispossessed or disturbed the defendants in their possession, and that irrespective of the strong provision contained in the 29th sec. of 18 Vic., that in no case shall this company be adjudged to give up possession of lands they lawfully obtained possession of; and if Moore could not do so, he could not lawfully evict this plaintiff holding under the defendants.

Moore in this respect had not a title to the land in question paramount to these defendants. The claim that he had in it was one for compensation, and which in no way could affect this plaintiff.

On the whole, we are of opinion that the defendants are entitled to judgment, and that the rule should be absolute to enter a nonsuit.

Rule absolute.

THE GEORGIAN BAY LUMBER CO. OF ONTARIO V.
THOMPSON ET AL.

*Promissory note—Partial failure of consideration—Sale of timber limits—
Fraudulent representation—Equitable plea.*

Declaration by payees against makers of a note for \$1000, payable at three months. Plea, on equitable grounds, that the plaintiffs falsely and fraudulently represented to the defendants that they had the right to cut hardwood timber under a crown license on certain lands, of which they gave defendants a list: that defendants, wishing to purchase such right, had all the lots examined, and thereupon, relying upon and believing plaintiffs' said representations, and being induced thereby, as plaintiffs well knew, defendants agreed with the plaintiffs to purchase the right for \$2,800, of which \$1,800 was paid down, and this note given for the balance: that defendants relying, &c., cut and made timber on the lots: that the plaintiffs had no such right in respect of a large quantity of said lands, by reason whereof defendants' rights acquired under said agreement were worth less by more than \$1,000 than the plaintiffs represented they were possessed of and pretended to sell: that defendants first became aware of the fraud after they had paid the money and given the note, and expended a large sum, and they are likely to lose the money expended by them in manufacturing a large quantity of the timber cut by them. And defendants prayed that it might be declared they were not liable to pay the note; and that the plaintiffs might be required to pay them a fair compensation for their loss by reason of such representations. *Held*, on demurrer, plea bad; that it shewed only a partial failure of consideration, and not of any definite sum; that it was not a case of either legal or equitable set-off; and that the defendants could not prevent the plaintiffs' recovery until defendants' right to damages or compensation and the amount of it had been ascertained; and, *Semble*, that it should have shewn a tender of or readiness to pay the value of, or an offer to give up to plaintiffs, the timber cut by them on the lots to which the plaintiffs had no right; and, perhaps, that since discovering the fraud they had cut no timber on such lots.

DECLARATION on a promissory note by payees against makers for \$1,000, payable at three months from the 1st of September, 1873.

Plea on equitable grounds: that before the making of the note the plaintiffs, pretending to have the right to cut hardwood timber under a Crown timber license from the Crown, on certain lands in the Townships of Rowen, Dalton, Digby, and Carden, furnished a list of such lands to the defendants, and falsely and fraudulently represented to them that they (the plaintiffs) had a right to cut hardwood timber as aforesaid upon each and every lot in the said list of lands mentioned. And the defendants being desirous of purchasing the said right from the plaintiffs to cut hard-

wood timber on each and all of the said lots of land on the said list, caused an examination of the said hardwood timber on the said lands to be made, and therefore the defendants, as the plaintiffs well knew, relying upon the said false and fraudulent representations so made to them, and believing the same to be true, and being induced thereby, as the plaintiffs also knew, so to do, made an agreement with the plaintiffs for the purchase from them of the right for the period of two winters to cut hardwood timber on each and all of the said lots, which the plaintiffs falsely and fraudulently represented they were possessed of as aforesaid, for the sum of \$2,800, to be paid by the defendants to the plaintiffs, \$1,800 whereof was to be paid down at the time, and the balance was to be paid in three months thereafter. And the defendants, in pursuance of the said agreement, and relying, &c., paid to the plaintiffs the sum of \$1,800 at the time of making the agreement, and at the same time, to wit: on the first of September, 1873, made their promissory note in the declaration mentioned as and for the balance of the said purchase money, and delivered the same to the plaintiffs, they, the defendants, relying, &c. And the defendants say that there never was any other or different consideration for the said promissory note other than the said agreement. And the defendants say that relying, &c., they entered upon the said lands and cut and made into timber a large amount of hardwood timber growing and being upon the said lots, and therein and thereabouts expended a large sum of money in good faith and in pursuance of the said agreement, relying, &c. And the defendants further say that the false and fraudulent representations so made, and whereby the defendants were induced to make and enter into the agreement and to pay to the plaintiffs the said sum of \$1,800, and to give the said note in the declaration mentioned, and to expend a large sum of money as aforesaid, were false and untrue, in that the plaintiffs had no such right as they falsely and fraudulently pretended, in respect of a large quantity of the said lands, by reason whereof the defendants have, under the

said agreement, acquired rights much less in value, to wit, by a sum exceeding \$1,000, than the plaintiffs falsely and fraudulently represented as aforesaid they were possessed of in respect of the said hardwood timber, and which they falsely and fraudulently pretended to sell to the defendants as aforesaid. And the defendants first became aware of the said false and fraudulent representations after they had paid the said money and delivered the said note, and after having expended a large sum of money as aforesaid. And the defendants are likely to lose the moneys by them expended in and about the manufacture of a large quantity of the said hardwood timber so cut and made by them. And they pray that it may be declared that they are not liable to pay to the plaintiffs the amount of the said note or any part thereof; and that the plaintiffs may be enjoined to pay to the defendants such a sum of money as may be just and equitable in the premises to compensate them for the loss and injury they have sustained by reason of the said false and fraudulent representations as aforesaid.

Demurrer, on the following grounds:—

1. That the plea professes to be a plea of no consideration, but nevertheless it discloses a consideration.

2. That it shews the defendants received some consideration for the said note, and a partial failure of consideration is no answer to the declaration, under the circumstances, and considering the nature of the consideration.

3. That it does not set up any defence to the declaration. It merely shews that the defendants paid money on a wrong assumption, which, if entitling the defendants to any relief, is not the subject of a plea in law to the declaration.

In this Term *McCarthy*, Q. C., argued the demurrer for the plaintiff. A plea of partial failure of consideration to a note is not a good plea unless it be pleaded to a specific part of the note. *Coulter v. Lee*, 5 C. P. 201; *Wood v. Ross*, 8 C. P. 299; *Agra & Masterman's Bank, Limited, v. Leighton*, L. R. 2 Ex. 56. The plea can only be supported under the

Administration of Justice Act of 1873, sec. 3, if it can be supported at all. There can be no relief on the facts of this plea in equity. A bill would not lie for relief in such a case: *Rawle* on Covenants, 4th ed., p. 573; *Small v. Attwood*, 1 Younge 407, 461, 6 Cl. & Fin. 232, 531; *Pike v. Vigers*, 2 Dr. & Walsh 1, 8 Cl. & Fin. 562. The defendants will have a fit remedy by an action for deceit. If there be no deceit or fraud, and the defendants have no covenant, they have no remedy either at law or equity. The plea does not allege that on discovering the deficiency of trees they stopped cutting.

J. K. Kerr contra. Such a plea is a good defence in equity, and it is so now either at law or in equity under the Act of 1873. The plea shews the defendants did not get what they bargained for. When a false representation has been made to induce a contract to be made, the fact that part of it has been performed is no reason why the person imposed upon should not abandon it, although he cannot restore what he got by or under it. The case of *Agra & Masterman's Bank, Limited, v. Leighton*, L. R. 2 Ex. 56, is precisely in point, as is also *Kemp v. Pryor*, 7 Ves. 237, 241. Under the Act of 1873 the defendants are entitled to relief. In *Best v. Hill*, L. R. 8 C. P. 10, a perpetual and absolute injunction could not be granted. In cases of unliquidated damages and the like, relief can be had under the Act of 1873. *Hamilton v. Banting*, 13 Grant 484, shews that unliquidated damages cannot be set off in equity against a mortgage claim, but that case is really an authority for what is contended for here; for if the counter claim in that case had been founded on fraud, as it is here, the Court would have settled the whole rights of the parties. Equity has jurisdiction in such a case as this; the only remedy is not by deceit in an action at law: *Ramshire v. Bolton*, L. R. 8 Eq. 294; *Ex parte Stephens*, 11 Ves. 24; *Dodd v. Lydall*, 1 Hare, 333, 337; *Kerr* on Fraud, 261, 266.

McCarthy, in reply.—If the defendants can get full relief in equity they cannot set up such a defence in this action.

WILSON, J., delivered the judgment of the Court.

It is admitted in the pleadings, for the purposes of the demurrer, that the promissory note sued upon was given by the defendants as part of the price of the right to cut hardwood timber on the lands in question, which right the plaintiffs pretended they possessed, and falsely and fraudulently represented they had, under a timber license from the Crown; and that the defendants, as the plaintiffs knew, relying on these representations, and believing them to be true, made the agreement alleged with the plaintiffs, while the representations were false, for the plaintiffs had no such right in respect of a large quantity of this land; and the rights which the defendants acquired under this agreement were less in value than those which were pretended to be sold to them by a sum exceeding \$1,000; and that the defendants did not become aware of the representations being false and fraudulent till they had paid the \$1,800, and given the promissory note sued on, and until after they had expended a large sum of money under the agreement; and that they made a large quantity of timber, and they are likely to lose money expended by them on its manufacture.

And the question is, whether they are entitled to be protected against the payment of the promissory note, and to have compensation awarded to them for their loss, or to any other defence or protection against the demand.

The prayer for judgment generally entitled the party, under the old law, to the proper judgment for the Court to give. *Street v. Hopkinson*, Hardw, 345; *Pitt v. Knight*, 1 Wms. Saund., 97, note 1.

And the old rule in equity was, on a prayer for general relief, the Court would give such relief as the facts of the bill showed the party was entitled to.

It is not likely we are going to be very strict now as to what the party may pray for in his declaration or plea. He ought to get such relief or judgment as the facts shew would be warranted.

This was a contract caused by the plaintiffs to be entered into by their fraud and misrepresentation, by which they

induced the defendants to buy the right to cut the timber on the lots in question for the sum of \$2,800, while the right they sold was worth less by a sum exceeding \$1,000.

There is unquestionably a wrong done to the defendants for which they are entitled to be indemnified in some form. They do not say they have been prevented from cutting the timber assumed to have been sold to them, but that they are likely to lose the moneys expended by them in and about the manufacture of a large quantity of the timber.

They do not say either that any of the timber they have cut was upon the lands to which the plaintiffs had not the right they represented they had.

The prominent charge is, that their purchase is worth less by more than \$1,000 than the sum they paid and were to pay for it. If the plaintiffs had not the right to many of the lots of land which they professed to have and to sell, the defendants have, upon the allegations made, been defrauded and deceived; and they cannot be required to go on and cut until they are stopped by the Crown or the owners of the lands or timber, as trespassers, before they complain of the fraud and deceit of the plaintiffs.

This is somewhat in the nature of a proceeding *quia timet*.

In an action for deceit the defendants would be entitled to recover the full loss of their bargain. They would have been entitled to such a measure of damages if the subject in question had been land, and they were suing under the like circumstances on the breach of the covenant for quiet enjoyment: *Lock v. Furze*, L. R. 1 C. P., Ex. Ch. 441; *Rolph v. Crouch*, L. R. 3 Ex. 44.

Here the defendants have "cut and made into timber a large amount of hardwood timber growing and being on the said lots." They do not ask for a rescission of the contract, nor could they probably get it under these facts.

They cannot replace things as they were. If the fraudulent purchaser of goods sell them to a *bonâ fide* purchaser, the original vendor cannot reclaim the goods: *Load v. Green*, 15 M. & W. 216; *White v. Garden*, 10 C. B. 919.

So, if one take shares in a company formed for working a mine on the cost book principle, and pay money on them—induced to do so by the fraud of the directors—and he afterwards take further stock in lieu of his dividends, and also assents to the company being changed to one registered with a limited liability, he cannot rescind the contract and sue for the money he paid for the shares, because he cannot put things in the same state they were in when he originally bought the shares. The remedy is for the deceit, in which full damages may be given: *Clarke v. Dickson*, E. B. & E. 148.

So, one receiving dividends on shares, and transferring the stock, cannot rescind: *Nicol's case*, 3 D. G. & J., 387.

And one who still has the article sold cannot, in an action on a bill of exchange for the price of it, plead its rotten or bad condition; for that is a mere partial failure of consideration: *Sully v. Frean*, 10 Ex. 535.

Nor can there be a rescission if the party defrauded have received a benefit: *Deposit and General Life Ass. Co. v. Ayscough*, 6 E. & B. 761.

There may be a rescission of a sale, although there has been a warranty given: *Murray v. Mann*, 2 Ex. 538.

If the contract be severable in its nature, as the purchase of so many shares of one kind, there may be a rescission as to those shares which the purchaser still has, he having disposed of the rest before he had knowledge of the fraud: *Maturin v. Tredennick*, 12 W. R. 740, 10 L. T. N. S. 331.

But if there be a single sale of different kinds of shares, there can be no rescission unless all can be restored: *Ibid.*

A partial failure of consideration is no objection in an action on a bill of exchange, if that failure applies to a defined portion of the sum claimed: *Forman v. Wright*, 11 C. B. 481; *Agra & Masterman's Bank, Limited*, v. *Leighton*, L. R. 2, Ex. 56.

The general rule of law is, that where a contract has been in part performed, no part of the money paid under it can be recovered back: *Whincup v. Hughes*, L. R. 6 C. P. 78.

It appears to me there can be now no rescission, because the defendants have received a benefit, under the contract as to the timber cut upon the lands to which the plaintiffs had the right to cut, because, also, the defendants have severed the timber from the lands to which the plaintiffs had no right to grant the leave to cut—if any timber were cut on these lands—and it may be have manufactured the timber on these last lands into such shapes and for such purposes that it would be valueless to the plaintiffs. They cannot, in fact, replace the plaintiffs as they were, nor the state of things as they were at the time of the contract.

It is clear, then, the defendants must seek for redress either in an action at law for deceit, or by this species of set-off which they have pleaded.

The cases of *Rawson v. Samuel*, 1 Cr. & Ph. 161, and *Best v. Hill*, L. R. 8 C. P. 10, are expressly in point, that in a case of this kind, although the accounting and compensation sought by the defendants arise from the same contract upon which the note sued upon was given, the plea does not show a good equitable set-off, and it is of no consequence that the claim which the defendants make against the plaintiffs' demand is for a sum which covers or exceeds the whole of it, and so there is no attempt to split up the indivisible entire demand which the note represents, for that was the allegation made in the case last mentioned.

It is quite plain that there must be an enquiry as to the quantity of lands to which the plaintiffs had no title, and the value of the defendants' loss of bargain by reason of such defect of title; and an enquiry of the amount of hardwood timber which has been cut by the defendants on the defective title lands, the value of which the defendants must give to the plaintiffs, if the plaintiffs are to be answerable for general damages for the defendants' loss of bargain. And it may be also that the defendants will be entitled to be protected against any future action for their wrongful cutting on such lands which they may apprehend they may be subjected to.

The case of *Hamilton v. Banting*, 13 Grant 484, is to the same effect. In this case, too, the defendants have made no offer to pay to the plaintiffs the value of the timber on the defective title lands, nor to give up the timber. They keep possession of all, and yet decline to pay the price: *Street v. Blay*, 2 B. & Ad. 456.

If this were a case of repudiation of contract altogether, every circumstance necessary to shew that the defendant had in fact given up the contract, and all benefit under it within a reasonable time after he had knowledge of it, must have been pleaded: *Bwlch-y-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324; *Anderson v. Costello*, L. R. 5 Ir. C. L. 544; *Lumley v. Desborough*, 22 L. T. N. S. 597.

It is not, however, a case of that kind; but the principle of these cases shews that the defendants should have averred a tender to restore the timber cut on the untitled lands, or its value, or have averred a readiness and willingness to do so.

The fact that the defendants did not stop cutting when they discovered the fraud, would only prevent the throwing up of the contract; but not the defendants' claim for damages or compensation.

Upon the whole, it is quite clear the plea is in reality a plea shewing only a partial failure of the consideration, and is not a defence to any or of any determinate sum; that it is not a case of either legal or equitable set-off; that the defendants cannot tie up the plaintiffs' recovery in their action until the accounts required are taken, or until the defendants' independent demand for damages or compensation has been tried, and assessed or fixed by an accounting.

And I am disposed to think the plea should have shewn a tender of or readiness to pay for the timber cut on the untitled lots, or a tender of or offer to give up the timber to the plaintiffs, and perhaps, also, it should have averred that since the discovery of the fraud the defendants had not cut any timber upon such lands.

The defendants will have a most adequate remedy

against the plaintiffs, who are not represented to be unable to pay any recovery which may be had against them, by proceeding at law for the deceit, or in equity for an account and such other relief as they are entitled to.

On the pleadings the plaintiffs are entitled to judgment on the demurrer.

Judgment for plaintiffs.

O'CONNOR V. THE TOWNSHIP OF OTONABEE AND THE TOWNSHIP OF DOURO.

*Road dividing townships—Jurisdiction over—Assumption of by county—
Duty to repair—Municipal Act of 1873, sec. 410, et seq.*

Sec. 410 of the Municipal Act of 1873 must be read as modified by secs. 416 and 431, and as meaning that every road dividing different townships shall, *when assumed by the County Council*, be within the exclusive jurisdiction of the county.

The only acts in this case done by the county with respect to the road in question, which was a road dividing different townships, was to make five yearly grants for the entire line, which was expended by commissioners appointed for the purpose. *Held*, no evidence of an assumption of the road, but the contrary, that being the course directed when the county is doing the work because the townships are not willing to do it themselves.

Quere, whether a county can so assume a road as to take the burden of repairing it off another municipality, except by by-law.

Remarks as to the duty of repairing highways, with reference to the age and population of the settlement, the means of the township, the nature of the ground, and all the surrounding circumstances; and as to the proper direction to a jury. The only rule that can be given is, that the public are entitled to have such a road as under all the circumstances they may fairly and reasonably demand, and the municipality be called upon to provide.

In this case, in an action for non-repair, a verdict for the plaintiff was upheld, upon the facts stated in the report.

APPEAL from the County Court of the County of Peterborough.

Declaration: that it was the duty of the defendants to maintain and improve a highway forming a township boundary line between the townships of Otonabee and Douro, within the County of Peterborough, the same not having been assumed by the county council,—yet

the defendants, disregarding their duty, neglected to maintain and improve the said highway, &c., whereby the plaintiff's mare, on the 3rd of August, 1873, then being lawfully used upon the highway, and without any neglect on the part of those so using the said mare, fell and broke one of her legs, and was so injured that she died.

Pleas, by the townships severally :

1. Not guilty. 2. The mare was not the plaintiff's. 3. That it was not the duty of defendants to maintain or improve the said highway.

Issue.

The evidence taken at the trial before the Judge of the County Court, material to be considered, was as follows :—

Hugh O'Connor, the plaintiff, said : The accident happened on the third of August, on the boundary line between the two townships, just opposite Wm. Leahy's lot. The bridge which had been there over a shallow creek was burned ; I don't know how long since ; the road was pretty rough there. I saw the place where the accident happened a week before the accident, and saw it again about half an hour after the accident. It is an opened road. Some folks have no other road to use. The mare was travelling from the west. There had not been much done to the road for a good while. That is my signature to the county council to open the road. I knew Leahy and my brother, who had my mare that day, would have to go off the road through the stream. It was not very dangerous to look at. They were going to Orde's to borrow a carriage. It was Sunday. There was no other way of getting to Orde's except round by the town road. It has been travelled by those living along the line.

William Leahy said : I was driving the mare. On the way back from Orde's, the bank curving out of the channel broke away under the mare, and she fell and broke her leg. She was on the walk. I knew the road before that, and travelled on it. The place became worn by the channel being cut with water. There had at one time been a bridge across the creek, and in consequence of none the accident

happened. I own the east half of lot 1, in 10th concession, opposite, on north side of the road, where the accident happened. There has been no other way of passing for two or three years. Thompson made a road after the bridge was burned to let him and others pass. It is the only road between plaintiff's and Orde's. There is a little hill going down to the creek. The bridge comes to the bottom of the hill. The road is good enough if the bridge is there for a light load. There was not room for teams between the corner of the bridge and the trench without a horse going into the trench. It was twelve or eighteen inches deep and the same width. The water had undermined the bank, and so broke with her. One wheel was eighteen inches lower than the others. The mare went four or five paces in the trench before the accident happened. She stepped up of her own accord to the off side, just about the corner of the bridge. I calculated to drive in the trench till I got to the flat beyond the trench. The road has been turnpiked. It is not generally travelled. Going to Orde's I had the other mare in the ditch; I am not sure that I had. If the trench had not been there, no accident would have happened. I have travelled over worse places. It was sandy loamy soil there. The bridge has been away for three or four years. I live opposite. I have often gone through the bed of the creek before. The hind leg of the mare was broken.

James O'Connor said: I live in the 9th concession of Otonabee. I was with Leahy at the time. We came down the hill slowly. The nigh mare was put in the trench. The bank was undermined. The mare fell on the pole and broke it and her leg. There is no other road from my place to Orde's. The road had been opened and work done on it. I have lived there nearly all my lifetime. All in that settlement use the road. I never heard it was a condemned road. It was a good road when the bridge was there. The bridge was built about twelve years ago. Work has been done on the road. Thompson's labour was allowed to be put on it. He fixed the fence up for the

accommodation of himself and the public. Labour was done upon it also, three years ago, by Leahy, to the east of the bridge.

Robert H. Orde said: I live on the line. I know the place of accident. The place appeared pretty good. I drove down on it the same day. My passing made it worse. My horse stumbled. The place then seemed dangerous. I had often passed with a horse and did not think it dangerous. The road would have been very good if the bridge had been repaired. I have always done my labour on the line, and Thompson has done his. I got \$15 public money to lay out on the boundary. I laid out the money between my fence and Peterborough about a year ago. My fence is to the west of the bridge. The pathmaster neglected that road. The pathmaster for Otonabee did labour on this line. For my own convenience I wished my labour done there. Parties living there travel the road. Pedlers go on it, and parties who have business.

James Hair said: I was pathmaster, but not on this line. Thompson refused to do his work with me. I said he should not have done his labour on this road,—a condemned road.

Adam Thompson said: I lived about where the bridge used to be for five years. The bridge was there at that time. The road was not good then nor now. The bridge was destroyed I think in 1869. It has not been re-built. I have no other way out. The council allowed me to expend my labour for two years on this road. I saw the place the evening of accident. I cut out a place to get over the creek when going to the east part of my farm. I should think the gully was one foot deep and as wide. It was represented as a condemned road; and for my convenience I got leave to put my statute labour on the road.

For the defence, *Mr. Blizard* said: I am Deputy-Reeve of Otonabee. Orde received \$15 county money granted for special purposes. There was a special grant of county of \$100 for the boundary line. The county has annually given money for the boundary line. No places on the line

mentioned where money was to be expended. I examined the place of the accident some time after the accident happened. I considered it about the safest part of the road. The county council in 1866 gave to this line \$150; in 1867, \$200; in 1868, \$125; in 1870, \$300; in 1872, \$100. The money was expended by commissioners appointed for the purpose. The road never has been opened to my knowledge, except for settlers there. I was in the council five years. I don't know of any one who was compelled to go that way in going to town. I found the line fenced up opposite Orde's after the accident. We considered it a condemned road. I don't know who put up the fence. There was no way from James O'Connor's to Orde's except by this line. I had a meeting with our Reeve and the Reeve of Douro to see about settling this. Douro would give \$90, and our council refused. The plaintiff would have taken \$90 to settle.

John Miller said: I know the road was not a good one; understood it was not maintained, and so Thompson got permission to do his labour. Otonabee never gave money for the line.

Robert Brown said: I once crossed along the road last summer; I tried to avoid it; it was so bad.

A petition to the county council was put in, signed by the plaintiff,—James O'Connor,—William Leahy, Adam Thompson, Robert H. Orde, James Hair, and twenty-five others, stating that the boundary line between Otonabee and Douro had never been opened between the centre of lot one, in the eleventh, and lot one, in the eighth concessions of Douro; and that the occupants of these lots were put to great inconvenience, and were compelled to make a long detour to reach the town of Peterborough; and that a small expenditure would make the road good, and be a great convenience to the petitioners and the public generally; and they prayed that the road might be opened and made passable.

At the close of the evidence a nonsuit was moved for on various grounds.

The case was left to the jury.

The learned Judge directed the jury that in his opinion the evidence did not shew the county had assumed the road ; and that if the injury happened from the road being left out of repair an unreasonable length of time, and the plaintiff did not by his own negligence contribute to it, he was entitled to recover.

The defendants' counsel objected to the charge. He contended the learned Judge should not have told the jury that was no evidence of an assumption of the road by the county council ; and that they should also have been told that if the road had not been opened as a travelled road, and the plaintiff knew it, he could not recover.

The jury found that the county council had not assumed the road ; and that the mare was injured by reason of the road being out of repair ; and they gave a verdict for the plaintiff and \$120 damages.

A rule was granted in the Court below, calling on the plaintiff to shew cause why a nonsuit or verdict should not be entered for the defendants ; or why a new trial should not be granted on grounds set out in the rule, (and mentioned in the reasons of appeal set out below.)

After argument, the learned Judge pronounced his opinion as follows :—

“ The learned counsel for the defendants moved for a nonsuit on four grounds set out in the rule. The Judge overruled the objections, and leave to move was reserved to the defendants.

The case went fairly to the jury, with a charge from the Judge. The learned counsel's only objections to it were * * [as stated below in the first four grounds of appeal].

The defendants' rule mentioned six grounds of nonsuit. The first four grounds were substantially the objections taken at the trial. The two last were not then submitted.

As to the first ground, there was ample evidence that the road had been opened as a public or travelled road.

As to the second, there was no evidence to shew that the county council had assumed the road, nor can the other reasons assigned prevail.

The rule is also for a new trial on three grounds.

As to the first. The Judge's charge and the evidence well warranted the verdict.

As to the second. The charge was right, and there was no misdirection.

As to the third. The jury found, in addition to the written answers to the written questions under the charge, which was sufficiently in favour of the defendants, that they were guilty of the negligence imputed to them; and the plaintiff did not, by his own negligence, contribute to his loss.

The learned counsel has not cited any cases in support of his contention. I refer to 36 Vic., ch. 48, secs. 404, 409, 410, 414; also to *Harrold v. The Corporation of the County of Simcoe and The Corporation of the County of Ontario*, 16 C. P. 43, confirmed in Appeal 18 C. P. 9, particularly to Chancellor Vankoughnet's judgment as to the general liability of defendants and the cases cited in the arguments."

And he discharged the rule.

The grounds of appeal were: The rule ought to have been made absolute for a nonsuit, because—

1. The road never having been opened as a public or a travelled road within the knowledge of the plaintiff, he cannot recover as for negligence in not maintaining the road in repair, the only right being to compel the opening of the road by the proper proceedings.

2. The evidence shewed the county council had assumed the road.

3. The plaintiff cannot recover by reason of the absence of the bridge, as this was well known to the plaintiff and his driver before; and they knew they would have to pass through the bed of the stream as they had done before.

4. The cause of the accident, namely, the trench or gully cut by the water in the road through the bed of the stream, was of recent occurrence, and not brought to the notice of the defendants, and in respect of which there was therefore no negligence.

5. The plaintiff having driven his mare into the trench and permitted her to go out again before he intended, by

which the injury was occasioned, contributed to the loss or injury.

6. The defendants are not liable for any damage occasioned to the plaintiff by reason of his going through the bed of the stream, owing to the bridge being away, as he voluntarily assumed the risk.

Or, the rule should have been made absolute for a new trial, because :—

1. The verdict was against evidence and the Judge's charge, in this, that there was no evidence of negligence on the part of the defendants, inasmuch as the trench that was the occasion of the injury was of recent occurrence, and of which the defendants had no knowledge ; and that there was contributory negligence.

2. Of the misdirection of the learned Judge, in directing the jury that there was no evidence that the county had assumed the road.

3. The jury did not find upon the question of negligence at all ; their only finding being their written answers to the written questions submitted, which did not involve the question of negligence.

In this term, *Hector Cameron*, Q. C., argued the case for the appellants. The defendants, as townships, were not liable for the maintenance of the road in question, which was one between townships. There was no necessity for a by-law of the County to assume the road : The Municipal Act of 1873, sec. 410. The plaintiff's horse was injured on a part of the township boundary line which had never been opened and used as a road or highway ; and the driver having chosen to go along a dangerous part of the line where there was no road, must be held to be answerable for his own negligence and loss : *Saunders on Negligence*, 29 ; *Addison on Torts*, 4th ed. 384 ; *Bradley v. Brown*, 32 U. C. R. 463 ; *Regina v. The Corporation of the Village of York-*
v 22 C. P. 431. No notice of the dangerous condition of the road was shewn to have been given to plaintiffs : *Bateman v. The City of Hamilton*, 33 U. C. R. 244.

Patterson, Q. C., contra. The fact that this road was

not altogether safe is no reason why the plaintiff should be debarred from using it. He may run some reasonable degree of risk in the endeavour to use it; and if he be injured by reason of its bad condition, exercising all due care on his own part, the person or body liable for its repair will be answerable for the consequences. The question in such a case must be, whether the person using the road while it was in such a state was acting so recklessly that he was contributing to his own injury. There was, at the least, evidence to go to the jury upon that point, and therefore there could have been no nonsuit: *Clayards v. Dethick et al.*, 12 Q. B. 439; *Marriott v. Stanley*, 1 M. & G. 568. The evidence in fact shewed the road had been used in its present state for many years by the settlers there. Sec. 416 of the Municipal Act applies to roads between townships; and as to these the township councils have a common jurisdiction. It is not consistent with sec. 410, which gives the county council exclusive jurisdiction. Sec. 431 shews how the county council are to act if the townships do not maintain the road. If the county have to assume the road, that must be done by by-law. There was here no contributory negligence: *Radley v. The London & North Western R. W. Co.*, L. R. 9 Ex. 71; *Weller v. The London, Brighton & South Coast R. W. Co.*, L. R. 9 C. P. 126. The following cases were also referred to on the case generally: *The Corporation of the County of Wellington v. Wilson*, 14 C. P. 299, 16 C. P. 124; and *Rose v. The Corporation of the United Counties of Stormont, Dundas, and Glengarry*, 22 U. C. R. 531.

WILSON, J., delivered the judgment of the Court.

All questions arising upon the Municipal Act are entitled to be considered with care, as so many bodies are acting by it, and are directly affected by the decision to be given.

The questions are:—1. In whom was and is the care and jurisdiction of this road vested by the statute. In the townships or in the county?

2. Did the county council ever assume the road as a county road?

3. Was it a travelled or public road, so that the plaintiff could complain of the private injury he sustained by the loss of his horse upon it, in consequence of the state it was in?

4. Was the corporation which had the care and jurisdiction over the road in fault, for not having it at the place in question in a better state than it was at the time of the accident?

I think that the decision of these questions will enable us to determine the whole case. The points of contributory negligence,—the finding being against evidence,—and as to misdirection, and negligence of the defendants, we do not interfere with, further than they may be involved in the preceding questions.

As to the first question, the 36 Vic. ch. 48, sec. 410, enacts that the county council shall have exclusive jurisdiction—

1. Over all roads and bridges lying within any township of the county, and which the council by by-law assumes as a county road or bridge, until the by-law has been repealed by the council;

2. Over all bridges across streams separating two townships in the county; and

3. Over all bridges crossing rivers over two hundred feet in width within the limits of any incorporated village in the county, and connecting any highway which is on the continuation of a county road leading through the county; and

4. Over every road or bridge dividing different townships.

The *first* subjects in this section it is quite plain must be assumed by the county by by-law. The other three subjects are not within that part of the section to which the word *by-law* refers.

That section does not in terms require that the last three subjects shall be assumed by by-law. The section reads, taken by itself, that the county council shall have exclusive jurisdiction over these three subjects.

Sec. 412 requires that the *first* subjects so assumed by *by-law* shall be improved by the county, and that the

third subjects shall be built and maintained by the county ; and sec. 413 requires that the *second* subjects shall be erected and maintained by the county.

It is therefore the positive duty of the county to perform the necessary acts with respect to subjects two and three, although the county has passed no by-law assuming such subjects, because the county council has exclusive jurisdiction over them.

It follows that the county, with respect to subjects four, which are in the provision that applies to this case, "every road or bridge dividing different townships," has in like manner exclusive jurisdiction over it, and will be bound to take care of it, and work, maintain and repair it as a road, without assuming it by by-law, and although the statute has not said so indirect language as it has as to the first three subjects, unless there be some provision in the statute which requires a different construction to be put upon that part of section 410.

Sec. 411 declares that the county council *may assume*, make and maintain any township or county boundary line at the expense of the county ; or may grant such sums from time to time as they may deem expedient. That does not necessarily mean boundary lines between municipalities. It may apply to a township or county boundary coming to or being limited by any large water, and to which there is no adjoining or adjacent municipality on that side.

Sec. 414 is that all township boundary lines *not assumed* by the county council shall be opened, maintained, and improved by the township councils ; and does not either of necessity mean that the boundary should be one between municipalities.

Sec. 415 is that township boundary lines forming also county boundary lines, and not assumed or maintained by the respective counties interested, shall be maintained by the respective townships bordering on the same.

That does not apply to this case ; and it appears to conflict somewhat with sec. 411.

So far, there is no inconsistency. The provision in sec.

410 may well stand, that the county council shall have exclusive jurisdiction over "every road or bridge dividing different *townships*."

But some of the other sections create a good deal of confusion.

Sec. 416 enacts,—“In case a road lies wholly or partly between a county, town, city, *township*, or incorporated village, and an adjoining county, town, city, *township*, or incorporated village, the councils of the municipalities between which the road lies shall have joint jurisdiction over the same,” &c. Secs. 417 and 418 have also some bearing upon it.

The 416th section provides expressly for a road between *townships*; and it gives the councils between which the road lies joint jurisdiction over the same. That is quite inconsistent with the county council having exclusive jurisdiction in such a case.

Sec. 431 enacts,—“Whenever township councils fail to maintain township boundary lines *not assumed* by the county council, in the same way as other township roads, by mutual agreement as to the share to be borne by each, it shall be competent for one or more of such councils to apply to the county council to enforce joint action on all township councils interested. Secs. 432 to 436 refer also to this matter.

If this section cast the burden of maintaining a road between townships upon these townships in all cases in which the county council has not assumed the road,—then it is inconsistent with the construction of sec. 410 being that such a road is within the exclusive jurisdiction of the county, without any assumption of it by them at all.

The only way to bring these sections into accord is to read the 410th section as modified by the 416th and 431st sections, and as meaning that every road dividing different townships shall, *when assumed by the county council*, be within the exclusive jurisdiction of the county. In that way the whole of these sections may be made to agree. The words which I think must be read as if they were

contained in the 410th section, must be presumed to be there by necessary implication, and in order to give effect to the whole Act: *Opinion of the Judges*, 3 Bing. 196, per Best, C. J.; *Young v. Hughes*, 4 H. & N. 76, per Martin, B., 85.

The case of *McBride v. The Corporation of York*, 31 U. C. R. 355, so far as it expresses that roads between townships are, without having been assumed by the county, within the sole control of the county, must be modified. That was a case of one of such townships attempting to close a part of the highway between the two, which it could not do, as that power belonged to the county.

By sec. 440, sub-sec. 2, the county may pass by-laws "for opening * * * and stopping up roads * * * running or being within one or more townships, or between two or more townships of the county. * * *" That power, too, may be exercised whether the county has assumed the road or not.

We are of opinion the jurisdiction over these roads was in the two townships between which this road lies.

As to the second question: A county council may accept a road as dedicated by a private person, although there was no by-law signifying such acceptance. Whether the county can assume the burden of the road off another municipality without a by-law, may be very questionable.

The county may so interfere with a township road as to be responsible to some extent and in some respect for works badly done which have occasioned injury; but whether after repairing a road they would be liable for not maintaining the repair, when they had not assumed the road by by-law, I very much doubt. I feel very strongly that until the legal liability was duly taken off the township by the county, the township would still remain liable to the public for the condition of the road.

If the county can assume the road without a by-law, it was a matter of fact whether the county had assumed it or not. The learned judge thought there was not sufficient evidence of it; but he left it to the jury, and they found

against it. That finding appears to be according to the evidence. The only acts of the county done with respect to the road were in making from 1866 to 1872 five yearly grants for the entire line, amounting in all to \$875, which was expended by commissioners appointed for the purpose.

That is the course directed to be taken by secs. 434, 435 and 436 of the Act, when the county is doing the work for the townships because the townships are not willing to do it themselves. That is no evidence of an assumption of the road, but the contrary. That question must be answered in the negative.

As to the third question. It is not quite easy to answer it. It is certain there is evidence that a bridge was erected at the place of the accident about twelve years ago, and that it remained up for about seven years; that for the last five years there has been no bridge there; that those who have used that part of the road since that time have had to drive through the creek which the bridge had spanned; that some of the witnesses say the road was with the bridge a bad road, and as bad as it is without it,—while others say it was a very good road while the bridge was up; that it rather appears that across the three concessions, from eight to eleven, the road has never been properly opened or made, but a little labour and money have been expended upon it for the mere use of the occupiers, and it is not used as a highway or road for any other purpose than to pass from one near neighbour's place about there to the other.

The actual shape and position and formation of the road at the place of the accident it is not quite easy to make out from the evidence.

I believe Douro is to the north of Otonabee. The mare was going from west to east when she was injured. The team drove down a little hill towards the creek on the walk. The mare, one of the team, was going along in a trench twelve or eighteen inches deep; she stepped up out of the trench of her own accord, just about the corner of the bridge, and the bank on to which she stepped, having

been undermined by the water, gave way, and the mare fell and broke her hind leg. The driver says he intended to have driven her along in the trench till he got to the flat beyond the trench, but she stepped up out of the trench he said, of her own accord.

What the mare was doing up on the bank when the bridge was gone, and why she was not kept in the trench until the team got to the flat, as the creek had to be crossed, is not explained in the evidence, but no doubt it was all fully detailed and commented upon, and considered by the jury; and they must have thought the driver was not to blame in any respect for the accident.

As to the road itself, we cannot make out in what way precisely the case was submitted to the jury.

We think in a case of the kind it might be said that a township could not be required to open up and improve all their roads at once; that they must be allowed a reasonable time to do so; that such time must depend upon the requirement there is for such a work, the number of persons to be provided for, the means and ability of the township, and the other public works which they have to attend to.

In a perfectly new township, to which a few settlers have gone, they cannot expect roads to be made at all for a time. They must be content to make such a passage themselves to their lots, which all the early settlers in a new district have been obliged to do before them,—and to wait until they can get such public help as can be afforded to them, which, with their own efforts, will give them as good a road as can be reasonably made for them in such a place, and with such means and opportunities as can be properly directed to that purpose.

As the settlement becomes older and more numerous and wealthy, the natural roughness and inequality of surface should be remedied, swamps should be filled,—or laid over with a corduroy at least,—and creeks bridged; stumps, too, should be removed, and the road straightened, turn-piked, and ditched.

It is manifest that must be a work of time; and it

would be impossible to maintain an indictment against a township for not having a highway in a better state than they could reasonably have it in under all these circumstances.

The road that will do because it must do, and is the only road that can be given in a new country, will not answer in an older and better settled place ; and the road that will do there may not be sufficient in a wealthier and more travelled section ; and the road that will do there may not do in a town or city ; and the road that will do in one part of a city may not do in the main or principal streets of the same city. " Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square ;" per Parke, B., in *Payne v. Haine*, 16 M. & W. at p. 545.

The only rule that can be given is, that the public are entitled to have, and the body having jurisdiction are required to provide, such a road, which, under all these circumstances, and any others that may have a bearing on the enquiry, the public may reasonably demand, and which the governing power may, according to all the like circumstances,—and according to their ability also,—be fairly and reasonably called upon to grant.

I am not wholly satisfied the case has been exactly considered and submitted to the jury in that light ; and the third question I cannot answer as readily as I should like to be able to do upon the evidence.

The fourth question is in substance answered by what I have said to the third question.

The defendants would find it difficult to urge this point successfully upon the jury if another trial were granted, where all that is complained of is, that the road is not so good now as it was twelve years ago,—when the line was probably not so well settled nor the municipalities so well able to put the road into repair as they are at present ; and that if a bridge were built twelve years ago there, perhaps no very good reason can be given why they cannot replace it now.

We are not able to say there is anything wrong which should be amended. The case was, upon the whole, fully tried, and the conclusion is sustainable by the evidence and in law. The damages, too, are not large.

We must therefore dismiss the appeal with costs.

Appeal dismissed with costs.

HOPE ET AL. V. STEWART ET AL.

Action on common counts—Verdict—Issues divisible.

In an action on the common counts, the pleas of *nunquam indebtedatus* and payment are distributive, and a verdict may be entered on these issues for so much of the amount sued for as the plaintiff fails to recover.

Such a verdict may not be proper in every case. In this case the substantial question at the trial was the plaintiff's right to a sum of \$410, which the jury found for defendants, but the plaintiffs had a verdict for a sum of \$20, which defendants had never disputed, and had, as they asserted, unintentionally omitted to pay. Under these circumstances the verdict was entered in defendants' favour for the residue.

ACTION on the common counts for goods bargained and sold, &c., the plaintiffs claiming at the end of the declaration \$600.

Pleas.—Never indebted, and payment.

The particulars stated a demand of the price for 40 tons of iron.....	\$ 1,690
And for the price of 10 tons "shipped to Brown & Patterson, of Whitby, but sent in error by the G. T. R. Co. to London, and subsequently sold and delivered to you at \$41 per ton.".....	410
	<hr/>
	\$ 2,100
Credits.....	1,670
	<hr/>
Balance claimed, besides interest.....	\$ 430

The cause was tried before Morrison, J., at the Winter Assizes of 1874, at Hamilton.

The question at the trial turned substantially on the liability of the defendants for the last ten tons of iron.

The iron, it was alleged, had been sent by the plaintiffs from Montreal, but in some way it had gone to London in place of to Whitby.

The jury found a verdict in favour of the defendants as to the ten tons.

The plaintiffs claimed, besides the \$410, already men-

tioned, according to their particulars, the difference

between the price of the 40 tons.....	\$ 1,690
And the amount paid, of	1,670

Being the sum of.....	\$ 20
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and for this they got a verdict.

In Hilary Term last, *Mackelcan* obtained a rule calling on the plaintiffs to shew cause why the *postea* should not be amended by entering a verdict for the defendants as to the residue of the amount claimed in the declaration beyond the sum of \$20, for which a verdict was found for the plaintiffs.

In this Term *John Paterson* shewed cause, and referred to *Welby v. Brown*, 1 Ex. 770, and *Traherne v. Gardner*, 8 E. & B. 161.

Mackelcan supported the rule, and cited B. & L. Prec. 3rd ed., 12; *Cousens v. Paddon* 5 Tyr. 535.

WILSON, J., delivered the judgment of the Court.

In the case last mentioned, which was an action of debt for goods sold and delivered, &c., the plaintiff demanded in all £1,500. The defendant pleaded never indebted, payment as to £338, and a set-off as to £500. The plaintiff claimed in his particulars £396 12s. for bricks. The jury found the bricks of inferior value, and valued them at only £335 3s. The defendant then proved a payment of £314 3s., and not £338, as he had pleaded, and a set-off of £21, and not £500, as he had pleaded. But the payment and set-off proved and allowed amounted together to £335 3s., the whole of the plaintiff's demand as awarded by the jury. The Court directed the verdict as to the £314 3s. on the plea of payment to be entered for the defendant, and

as to the £21 on the set-off to be also entered for him; and as to the plea of *nunquam indebitatus*, that the verdict on it should also be entered for the defendant, except as to the sum of £335 3s., and for the residue on each of these pleas for the plaintiff.

This case does not apparently refer to the plea of never indebted being divisible, excepting when there is some other plea, which with the general issue entitles the defendant to a verdict against the plaintiff on the whole record. The plea of payment is considered to be always a divisible plea.

In *Welby v. Brown*, 1 Ex. 770, the declaration was on the common counts. The pleas were never indebted, the statute of limitations, and, thirdly, no signed bill of costs delivered. The particulars of claim were for £63 12s. 8d. The verdict was for the plaintiff on the first issue for £18 10s. 3d., and for the defendant as to the residue of the sum demanded,— for the plaintiff on the second issue, and for the defendant on the third. The general verdict was in favour of the defendant.

In *Traherne v. Gardner*, 8 E. & B. 161, the declaration was for money had and received. The plea was never indebted. The particulars claimed eleven items, amounting altogether to £17 1s. A verdict was taken for the plaintiff, subject to a special case. The plaintiff afterwards got a verdict for £9 1s. 4d., and nothing was said as to the residue. On a motion to revise the taxation of costs, it was discussed whether the general issue was distributable.

Mr. Justice Coleridge, in giving the judgment of the Court, said, at p. 183: "It was said that, also, that the judgment had not been given in this case for the defendants, or a verdict entered for them for any part. But, as this ought to have been done, and might be done now, we think that we ought not to make the rule absolute on that ground. If necessary for subsequent proceedings, the *postea* may be set right in this respect; and then the question of whether a defendant can properly in such a case have a verdict for the residue would be on the record. We think

that we ought to follow the case of *Welby v. Brown*, 1 Ex. 770."

He also said, at p. 181: "We ought to hold that an issue of this kind may be treated distributively where the justice of the case requires that it should appear that the defendant has made a successful resistance as to a distinct part of the the claim."

It was determined in *McBride v. Lee*, 16 C. P. 315, following the English practice in that respect, that the issue in ejectment was divisible.

Sec. 104 of the C. L. P., Act requires the finding on pleas "which are capable of being construed distributively," to be entered "for the defendant in respect of so much of the causes of action as are answered, and for the plaintiff in respect of so much of the causes of action as are not answered."

There can scarcely be a stronger case than the present for the expediency and justice and application of the rule. The parties were disputing as to a specific quantity of ten tons of iron, amounting to \$410, and there happens to be a small sum of \$20, not left purposely unpaid, as the defendants say,—but purposely not demanded by the plaintiffs, as they say, on the settlement that was made. It is needless to explain all the facts relating to it. It is sufficient to say that the plaintiffs made use of that sum being left unpaid as a strong argument to establish the liability of the defendants for the disputed quantity of iron, and when they failed to recover for the iron they became entitled to recover for the \$20.

That small sum was not the cause of nor the object of the suit, and the defendants never disputed their liability to pay it.

They are paying sufficiently the penalty for not having arranged that sum by being made answerable for the costs connected with its recovery; but it is not right they should have a general verdict against them when they have succeeded substantially in the suit.

And it is plainly not right that they should be precluded from having a verdict expressly in their favour for so much

of the causes of action which they have successfully answered.

In *Todd v. Stewart*, 9 Q. B. 159, in Ex. Ch. 9 Q. B. 767, the defendant pleaded as to the £400 the causes of action sued for—payment as to £43 6s. 9d., and as to the residue that the plaintiff brought a former action for the same causes of action, and that he recovered in that suit £314 8s. in respect of the said causes of action, and for costs. And it was held in the Court below that the plaintiff was entitled to judgment *non obstante veredicto*, because the £43 6s. 9d. and the £314 8s., together amounting to £357 14s. 9d., did not answer the whole £400, and left wholly unanswered and unaccounted for the difference.

That judgment was reversed in the Exchequer Chamber, the Court being of opinion that the plea was in effect an estoppel against the plaintiff that any more than he had recovered was due to him, and that the plea sufficiently alleged after verdict that no more was due to the plaintiff than he had recovered, or “if the true meaning is * * that the plaintiff, having once sued in *indebitatus assumpsit* for the very same debt now claimed in an action of debt, and having had the amount assessed by the jury and adjudicated on by the Court, has had all the benefit which could be given by a judgment, and cannot again sue for the same debt, then unquestionably the plea is good in substance.”

Now, the very balance, not expressly answered in the preceding case, and which occasioned so much trouble because it was not shewn how it was disposed of, the defendants desire to have no future trouble about the like sum in this case, and to shew at once how it was in truth disposed of. And there cannot be a stronger argument in favour of entering the plea distributively, now that the statute and the practice have expressly warranted it.

In pleading a former recovery see also *Seddon v. Tutop*, 6. T. R. 607, and *Lord Bagot v. Williams*, 3 B. & C. 235.

The rule will be absolute in the following terms:—that the defendants on the first issue were indebted to the plaintiff for goods bargained and sold, and on accounts

stated between them, in manner and form as therein alleged, to the extent of \$20; and that the defendants had not satisfied and discharged the said sum of \$20; and that the residue of the said issues be entered for the defendants.

It will be seen there are special reasons why the issue is distributed in this case, and it must not be assumed it will be done, or that it would be proper to do so, in every case.

Rule absolute.

FILSCHIE V. HOGG.

"Tools," meaning of—Contract—Party to sue—Evidence of admissions.

On a sale of malleable iron works "and all machinery and tools in and about the said works connected therewith:" *Quære*, whether annealing pots, used in the manufacture of the iron, would pass under the word "tools;" but *Held*, that this was a question for the jury.

Where in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant for the sale by the latter to the former, but the land on which the works and machinery were was conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration. *Held*, that the plaintiff, and not his wife, was the proper person to sue.

Held, also, that the acts or admissions of the plaintiff were clearly admissible in evidence.

DECLARATION. First count: on a special agreement, setting out that the defendant agreed, among other things, to sell the plaintiff certain machinery and tools and certain works mentioned in the agreement; breach, that the defendant refused to convey a certain portion of the machinery and tools, *i. e.*, certain tools and iron pots, weights, and scales, which were at the time of the making of the agreement in and about the works, and had been provided by the defendant for use therein, and were necessary and had been used by the defendant in the works.

Second count: trover for the same articles.

The common money counts were added.

Pleas: 1. *Non assumpsit*. 2. To first count, that the defendant conveyed to the plaintiff all the machinery

and tools mentioned in the agreement. To the second count, not guilty, and not possessed. To the last count, *nunquam indebitatus*, and payment.

The case was tried at the Fall Assizes, at Guelph, before Galt, J.

At the trial the plaintiff was examined, and he produced the agreement, dated 10th March, 1873, as follows: "The defendant agrees to sell, and plaintiff agrees to purchase the malleable iron works belonging to said defendant, and lots 12 and 13, west side of Suffolk Street, Guelph, Arnold's survey, and all machinery and tools in and about the said works connected therewith."

In consideration whereof the plaintiff agreed by proper deed to cause to be conveyed to defendant a certain farm lot and other property described in certain deeds to Mrs. Filschle, and also to give a mortgage on the iron works.

The principal question at the trial was whether pots and scales passed under the agreement as tools.

The plaintiff stated that among the tools that were in the workshop were sixty annealing pots, twelve bottoms for them, and fifteen tons of scales. (These scales, so called, were laminæ, or scales of iron that fly off hot iron in the act of being hammered or forged). Also 200 weights for putting on the pots when being used. He stated that these articles were used in the works, and were necessary, and that the business could not be carried on without them, and that they were all in the building at the date of the agreement: that he, the plaintiff, went into possession about a week after that: that three or four days previous to his taking possession he saw these things being removed: he saw defendant and told him the pots, &c., were his: that the business could not be carried on without them; that defendant said he did not mean to sell them with the place, and refused to give them to the plaintiff. The plaintiff described in what manner they were used in the malleable iron works.

A witness, who was a moulder, said, that he would call pots tools, that they were necessary in the manufactory as

well as the weights, and that the scales were almost universally used also.

Another witness stated that they could not make malleable iron without the pots, and that he would call them tools.

At the close of the case it was objected by defendant's counsel that the plaintiff could not recover: that his wife was the proper person to sue; that, as to the first count, the property passed in the tools by the agreement, and therefore there was no breach of the agreement; and that the articles were not tools within the agreement.

The learned Judge overruled the objections, reserving leave to the defendant to enter a nonsuit on the first objection; and as to the last, he was of opinion, and so directed the jury, that the scales did not pass under the agreement as tools, but that the other articles did.

For the defence the defendant was called, and he stated that after he entered into the agreement he executed a deed of the real property to the plaintiff's wife, and that he got a mortgage from her and the plaintiff; that about ten days after he was at the works, and his late partner was then shipping the articles in question to Hamilton.

The defendant's counsel was then going to shew that the these articles were then removed with the plaintiff's consent.

The learned Judge declined to allow the evidence unless the defendant's counsel would undertake to shew that the plaintiff had the authority of his wife to give such consent, and upon defendant's counsel saying that he could not do so, the learned Judge rejected the evidence.

The defendant also stated that the plaintiff never claimed the pots, &c., until this action was brought, on the 27th September.

Mr. *Robertson*, the late partner of defendant, was called, and stated that the day after the agreement he went to the works and separated the articles which the defendant told him had been sold to the plaintiff: that the plaintiff came there, and he pointed out to the plaintiff the things;

that he asked the plaintiff to leave the key with him, witness, until he shipped the articles; the witness could not recollect specifying the articles that were to be shipped. The witness further stated that he asked the plaintiff to buy some of the pots if he intended carrying on the business; the plaintiff said he did not know; he further said that the plaintiff did not claim them; that the pots were shipped on the 25th March to Hamilton, the plaintiff being present at the time. This witness, who formerly attended to the manufacture of iron, said that the pots and weights were used for that purpose, but that he would not call them tools, properly speaking.

The learned Judge in his charge told the jury that for the purpose of the trial they should consider the property to belong to the plaintiff, or rather that he had such an interest in it as to enable him to maintain the action on the first count; that as to the second count their verdict should be for the defendant, on the ground that the property belonged to the plaintiff's wife; and to find for defendant on the third count; that the word "tools" in the agreement covered the pots, bottoms, and weights, but not the scales.

The defendant's counsel renewed his objections as objections to the charge.

The jury found for the plaintiff on the first count, and \$450.32 damages, and for defendant on the other counts.

During Michaelmas Term *Guthrie* obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit, &c., pursuant to leave reserved, on the ground that the action should have been brought in the name of the plaintiff's wife; or for a new trial, on the ground of misdirection, in the learned Judge directing the jury that the pots and weights passed under the agreement, and in refusing to direct the jury that if the goods did pass, that under the circumstances the defendant had conveyed them, and the plaintiff could not recover under the first count; or for a new trial, on the ground that the learned Judge improperly

rejected evidence, that of the defendant and others, to shew that the plaintiff consented to the removal by the defendant of the goods in question.

In the last term *Merritt* shewed cause. The evidence rejected could only have been admissible under the plea of not guilty, which has been found in defendant's favor, and its rejection if erroneous therefore did the defendant no harm. As to the alleged misdirection the property did not pass: *Lanyon v. Toogood*, 13 M. & W. 27. Where anything remains to be done property does not pass. The plaintiff was the right person to sue: *Alton v. Midland R. W. Co.*, 19 C. B. N. S. 213; *Clay v. Southern*, 7 Ex. 717; *Sims v. Bond*, 5 B. & Ad. 389; *Coole v. Wilson*, 1 C. B. N. S. 153. As to the articles in question being tools, see *Arch. Cr. Pl.*, 17th ed., 530; *Regina v. Gray*, 9 Cox. C. C. 417, 10 Jur. N. S. 160. See also *Chinery v. Viall*, 5 H. & N. 288. Even if the property did pass, yet if the defendant broke his agreement we can maintain trover and sue on the contract: *Benjamin on Sales*, 2nd ed., 739, 740.

C. Robinson, Q. C., supported the rule. "Tool" is defined in the dictionaries as "an instrument of manual labor." (a) Pots are more properly utensils than tools. A carpenter's bench would not be called a tool, nor a lathe probably. The weights are not tools properly speaking; no particular kind of weight was necessary in the manufacture of the iron.

We say these things were never intended to pass, and that the plaintiff knew it. The wife really was the purchaser. The husband bought for his wife and paid with her property. The evidence rejected, of admissions for the plaintiff, was admissible. Defendant objected that the wife should sue, but the learned Judge said no. The defendant then offered to prove that he took the goods with the plaintiff's leave, but the learned Judge ruled that defendant should also shew that he had his wife's consent to give such leave.

(a) See also *Weale's Dictionary of Terms*, title "Tools."—REP.

Now if the plaintiff, and not his wife, was the proper person to bring the action, his admissions must clearly be evidence without reference to her. They would be admissible clearly even if he were suing as her trustee or agent: *Fisher's Digest*, 3569.

MORRISON, J., delivered the judgment of the Court.

The first question raised in this case is the entering of a nonsuit on the leave reserved, on the ground that the evidence shewed that the action should have been brought in the name of the wife of the plaintiff. Upon this point the plaintiff is clearly entitled to our judgment.

The contract sued on and produced at the trial is one entered into between the plaintiff and the defendant, and there is no ground for holding that the action was not properly brought in his name. The performance of the contract is imposed upon the plaintiff, assuming that the conveyance of the property mentioned in the contract was made to the plaintiff's wife, and that her property was also conveyed to the defendant as part consideration. The contract being entered into by the plaintiff, entitled him to bring an action for a breach of it.

In *Clay v. Southern*, 7 Ex. 717, Parke, B., says, at p. 718: "It is a perfectly well established principle, that a party who actually enters into a contract may sue or be sued on it. If it has been shewn the plaintiffs acted merely as agents of the company, the defendant might probably have maintained an action against the company for a breach of contract, but it does not follow that Clay and Newman are therefore precluded from suing upon it."

And in *Cooke v. Wilson*, 1 C. B. N. S., at page 164, Crowder, J., says, "I have always understood the law to be, that if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only. There is nothing upon the face of this agreement distinctly shewing that the plaintiff was contracting as agent for others. On the contrary, there is every thing to lead to the conclusion that he was contracting personally."

There the plaintiff on the back of the agreement had inserted after his name, "on behalf of the Geelong and Melbourne Railway Company," and he was suing for a breach of the contract. In this case there is nothing shewing that the plaintiff was not contracting personally.

I refer also to *Cothay v. Fennell*, 10 B. & C. 671, and *Skinner v. Stocks*, 4 B. & Al. 437.

The next point to be considered, and which is taken in the rule, is, the rejection of evidence by the learned Judge at the trial. We think that the learned Judge ought not to have rejected the evidence which the defendant proposed to give for the purpose of shewing that the plaintiff consented to the defendant removing and taking the articles in question.

The learned Judge rejected the evidence apparently under the impression that the wife of the plaintiff was the party entitled to the alleged tools.

The plaintiff is not only a party to the contract, but he is the plaintiff on the record, and he sues to recover damages for the non-delivery of these articles. I take it to be clear law that any thing he said in relation to the contract, or any act done or admission made by the plaintiff, may be given in evidence, such as admissions or statements that might go to shew that the articles for the non-delivery of which the action was brought were not included in the contract nor understood to be so between the parties, or that the defendant had a right to remove them, and that the plaintiff had consented to his doing so.

In *Bauerman v. Radenius*, 7 T. R. 668, Lord Kenyon in giving judgment says: "I take it to be an incontrovertible rule that the admission made by a plaintiff on the record is admissible evidence; and on the trial of this cause there was proof of an admission by the plaintiffs that they had no ground upon which to support the action."

And Grose, J., said, at p. 669: "Vandyck & Co. might either have sued in their own names * * * or in the names of the present plaintiffs. They have chosen to bring the action in the names of the latter, whom therefore we must consider

as the plaintiffs in the cause. As long as Bauerman & Co. are plaintiffs on the record they must be taken to be so in all the consequences. * * * It appeared by their acknowledgment that there was no foundation for the action, and that acknowledgment in this action must conclude Vandyck & Co."

And Lawrence, J., said: "I have looked into the books to see if I could find any case in which it was holden that the admission of a plaintiff on the record was not evidence, but have found none."

And in *Gibson v. Winter*, 5 B. & Ad. 96, Denman, C. J., says: "The plaintiff, though he sues as a trustee of another, must in a court of law be treated in all respects as the party in the cause. If there is a defence against him there is a defence against the *cestui que trust* who uses his name, and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for himself."

And in a late case, *Moriarty v. London, Chatham, and Dover R. W. Co.*, L. R. 5 Q. B., at p. 320, Blackburn, J., in giving judgment, says: "What the plaintiff in the record has said, is always evidence against him, its weight being more or less. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, still it would be admissible."

And Lush, J., said, at p. 324: "I also think that no distinction can be made with reference to the character of the party suing, whether it is a representative character or he is suing to enforce some right of his own. Either way the inference which the evidence tends to raise is the same, that the case is not a true one, and on that ground the evidence is receivable."

Then as to the alleged misdirection, the question whether the articles in question were tools within the agreement was essentially a question for the jury, and not a matter upon which the Judge can take upon himself to direct a verdict one way or the other.

The word tools, in the ordinary acceptance and use of

the word, in most cases, will readily indicate what the parties meant, such as the tools of a carpenter, or a smith; but there may be cases, such as the one before us, when it may be a matter of some difficulty to say what was included under the term tools.

The meaning or definition of the word tool in dictionaries is "an instrument of manual operation, apparatus, or utensils," &c.

All these terms, however, are employed to express the means of producing an end. In all cases what the parties meant when using the word must be a matter for a jury.

If the learned Judge, as his notes rather indicate, held that a portion of the articles called scales did not pass by the agreement as tools, and that the other articles did pass, and so directed the jury, without leaving it to them to say whether in their opinion these various articles were tools, and so withdrew the question from their consideration, a miscarriage in the verdict of the jury may have arisen from the learned Judge so holding; and upon this ground, as well for the rejection of evidence, we think the rule must be absolute for a new trial without costs.

New trial, without costs.

COLE V. BRUNT.

Trespass to land—Right to maintain—Possessory title.

The plaintiff and defendant, adjoining proprietors, on lots 18 and 17 respectively, and those through whom they claimed, had occupied up to 1867 according to a fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed further to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868 F. moved his fence on to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and new line, and in 1868-9 the plaintiff cut grass on this strip. O. afterwards sold to one J., who occupied up to the old line, and sold to defendant. The plaintiff in 1872 moved the fence to the new line, and defendant immediately replaced it, for which the plaintiff brought trespass.

Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass.

TRESPASS, *quare clausum fregit*, on part of lot 18, in the 5th concession of Darlington.

Pleas, not guilty, and that the land was not the plaintiff's, the question being one of boundary.

The case was tried before S. Richards, Q. C., sitting for, Richards, C. J., at the Cobourg Spring Assizes, 1873 without a jury.

It appeared at the trial that the plaintiff's title to the ten acres of lot 18, the *locus in quo*, was derived by deed dated 10th March, 1866, from one Waldron, who held it by deed, dated 31st May, 1847, from one John Farley, the owner in fee.

The plaintiff went into possession at the date of his deed.

Farley's father, from whom John Farley claimed, occupied lot 18 in question for forty years, bounded by the line claimed by the defendant as the boundary between lots 17 and 18.

The defendant occupied ten acres, part of lot 17, and all the occupants of these lots so occupied until 1867, the boundary line to that year between the plaintiff's and defendant's land being defined by a fence, which existed for thirty years.

In 1867 a survey was made, under instructions from the County Council, to run the lines between lots 15, 16, 17,

and 18. The line run by that survey between 17 and 18 placed the boundary line at the north end of the lots further east than that by which the owners occupied, no change being made at the south end.

The land of John Farley and the plaintiff's land were contiguous, and situated at the northern end of lot 18. One Ormiston, under whom defendant claimed, occupied a part of lot 17, opposite to plaintiff's and Farley's lands.

In 1868 Farley moved the north half of the fence between himself and Ormiston on to the new line as surveyed.

The plaintiff stated that Ormiston agreed at the time the survey was made to move the south half, but never did do so: that Ormiston also told Farley, in 1868, to cut the grass on the strip between the two lines inside his half of the fence: that in 1867 Ormiston told the plaintiff that he might occupy the piece between the old and new line; that in 1868 and 1869 the plaintiff cut the grass on this strip for ten rods opposite his ten acres; that the rest of Ormiston's land opposite that of the plaintiff being bush, remained in Ormiston's possession: that Ormiston sold the ten acres of lot 17 opposite the plaintiff's portion of lot 18 to one Jennings, who came into possession in 1870, and occupied it up to the old line, and he sold to defendant, who took possession up to the old line in 1872, and occupied it by that line until the summer of that year, when the plaintiff moved the old line fence to the new line, and immediately after the defendant's son put it back into the old line, where it still remains.

This latter act was the trespass complained of.

At the close of the case, the defendant having called no witnesses, it was objected that the plaintiff failed in making out a case.

The plaintiff contended, however, that he shewed that he, plaintiff, resumed possession of the strip between the old and new lines, which was part of lot 18, with the consent of Ormiston, by his cutting the grass, and so was entitled to maintain the action.

The learned Queen's Counsel was of opinion, assuming the new line to be the original boundary between lots 17 and 18, that, notwithstanding, the plaintiff and those under whom he claimed had lost title to the strip, under the Statute of Limitations, and he found in favor of the defendant.

A verdict was rendered for the defendant.

During Easter Term, 1873, *C. S. Patterson*, Q. C., obtained a rule *nisi*, to set aside the verdict, and to enter a verdict for the plaintiff, or for a new trial, on the ground that on the evidence the plaintiff was entitled to a verdict.

In last Michaelmas Term *J. W. Kerr* shewed cause. The fence which marked the boundary contended for by defendant, had been thirty years in position before the line was run by order of the County Council, and the plaintiff after that removed it. Farley, one of the prior owners, was in possession by the line of that fence for forty years. [*C. S. Patterson*, Q. C.—We admit that possession, but we say it does not enure to you. Ormiston also held lot 17 by that fence for thirty years, and for that time occupied part of plaintiff's land. After the line was run, Ormiston acknowledged the plaintiff's title, and moved, or said he would move, the fence.] Ormiston only promised. He never did move the fence. He sold to Jennings, who occupied up to the old line. The plaintiff moved it to the new line, but Jennings moved it back. After it was sold to defendant, plaintiff again moved the fence to the new line, but it was promptly restored. The presumption is, that defendant got to the old line: *Doe Perry et al. v. Henderson*, 3 U. C. R. 486; *McDonald v. McIntosh*, 8 U. C. R. 388; *McIntyre v. Canada Co.*, 18 Grant 367. The plaintiff never had sufficient possession to maintain the action: *McNeil v. Train*, 12 U. C. R. 451; *Street v. Hillyard*, 15 U. C. R. 326; *Bailey v. McNeely*, 20 U. C. R. 451; *Henderson v. Morrison*, 18 C. P. 221; *Walbridge v. Gilmour*, 22 C. P. 135; *Doe Hill v. Gander*, 1 U. C. R. 3.

C. S. Patterson, Q. C., supported the rule. The question is, whether we shew sufficient possession before the posses-

sion of Jennings and Brunt. *Lloyd v. Davies* 2 Ex. 103, settles that the *jus tertii* cannot be set up except by persons claiming under such title. We shew possession; we not only cut grass, but we were put into possession by Ormiston. The law is discussed and the cases collected in an article in 11. Jur. N. S. pt. 2, p. 151; see also *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Doe Quinsey v. Caniffe*, 5 U. C. R. 602.

Kerr, in reply, cited *Doe Beckett v. Nightingale*, 5 U. C. R. 518, 602; *Doe Taylor v. Sexton*, 8 U. C. R. 264; *Martin v. Weld*, 19 U. C. R. 631.

MORRISON, J. delivered the judgment of the Court.

In our opinion, the learned Queen's Counsel was right, for we see no ground upon which the plaintiff is entitled to recover. It was contended in the argument that the plaintiff was in possession at the time the alleged trespass was committed, looking at all the circumstances, and so entitled to maintain this action of trespass. There is no pretence for so holding. In my opinion, the defendant himself was a mere trespasser when he removed the fence; he had no title whatever to the land in question. Supposing the strip of land claimed to have been a portion of lot 18, as the learned Queen's Counsel held, he and those under whom he claimed had lost all title to it, by the defendant and those under whom he held having peaceably occupied it for upwards of thirty years.

A trespasser cannot give to himself what is understood by the law to be possession against another so as to eject or dispossess a person, such as this defendant, who was in lawful possession.

There was no evidence of acquiescence on the part of this defendant. On the contrary, he promptly asserted his right and replaced the fence.

It was contended by Mr. Patterson that Ormiston, through whom the defendant claimed, permitting the plaintiff to cut the grass in 1867 and 1868 amounted to putting the plaintiff in possession of the strip in question, and in effect entitled the plaintiff in 1872 to remove the

defendant's fence. Ormiston's title to the land was then indisputable, and it appears to us that the utmost that Ormiston did was to give a license to the plaintiff to cut the grass, or to occupy a part of the strip, a license which he had a right to revoke at any time, and which was revoked when he sold to Jennings, who occupied to the old line, and who conveyed the same occupation to the defendant, and who, from his purchase to the time the plaintiff removed the fence, was in possession, and occupied up to the old line as his boundary.

On the whole, we are of opinion that the rule should be discharged.

Rule discharged.

REGINA V. DAVIS.

Highway—Indictment for obstructing.

The defendant, having built a row of shops coming up to the highway erected a platform in front of them upon the highway, and raised about three feet above it, with a flight of steps leading down from one end and into the side road which intersected it. The road on which the shops were had been a public highway for forty years, until about fifteen years ago, when it was gravelled by a joint stock road company, who had since kept it in repair and collected tolls. The defendant was convicted on an indictment for thus obstructing the highway, the jury having found that the platform was in fact a nuisance.

Held, that the conviction was right, and that the road being a highway, its assumption by the road company was no answer to the indictment.

CASE reserved by the Chairman of the Quarter Sessions for the County of Elgin, of which the following are the material facts:—

In the December Sessions of the County of Elgin, 1873, Lathrop Davis was convicted for having unlawfully erected and maintained an obstruction on the public highway on that part of Talbot Road, East, in the Township of Yarmouth, in the said County, which runs between Lot 5 in the 8th Concession, and lot 5 in the 9th Concession of the said Township, and thereby obstructing the Queen's Common Highway there.

The alleged obstruction consisted in the erection of a

platform on the highway, immediately in front of some buildings used as shops, in the occupation of the defendant and his tenants, which front up to the northern boundary of the said Talbot Road, East. The platform stood wholly upon the highway, and not on the land and premises of the defendant.

The side road is a public travelled highway running at right angles, north and south of the Talbot Road, East, and to the east of Davis's, the defendants' premises, the eastern terminus of the platform is a flight of five or six steps running on to the side road crossing and at the northern point of intersection with Talbot Street.

The platform is two feet ten inches in height from the middle of the road, and there are some dangerous steps at the east end of it, particularly in icy time and wet or freezing weather, and during dark nights; for a person not knowing the steps were there might be pitched suddenly off the platform and fall on the steps.

There are four stores erected in the Davis block, occupied by the defendant and his tenants as grocers and dry goods and other merchandize vendors.

One Doyle built a shop to the west of defendant's block, and also erected a platform in front of his store, but neither of them made the platform continuous, so that foot passengers might pass from one to the other, but there was a vacant space of three feet between the two, which made it all the more dangerous, and made it obvious that neither platform was made for the public convenience of foot passengers but for the private convenience of defendant and his tenants, and of Doyle, themselves.

The platform complained of was erected for the more convenient unloading of goods from waggons to the stores occupied by the defendant and his tenants, because the defendant's block was erected on what used to be a rather low piece of ground, on which water used to accumulate in wet seasons of the year, and it therefore became necessary for the defendant to erect his building and elevate his door-sills and floors somewhat higher than would have been ne-

cessary on a higher piece of ground. And the defendant, in order to save his own land, has built his stores close up to the edge of the road, and the platform on the road, instead of placing his building back on his own land, and the platform up to the edge of the road, where he might have erected it as high as or in any way that he pleased.

That part of Talbot Road, East, between the 8th and 9th concessions has been travelled as a Queen's common highway for upward of forty years, ever since the first settlement of the township of Yarmouth, until a company was formed some 14 or 15 years ago, under the Consol. Stat. U. C. ch. 49, called the "St. Thomas and Aylmer Gravelled Road Company," which corporation appropriated, or affected to appropriate, that part of Talbot Road running from St. Thomas eastward for several miles, as part of their property under the third section of the Act, and they collect tolls on the said road, and have done so for ten years past, and keep the road in repair.

The company is still in existence, and have had the control of the road ever since their formation as a corporation.

The learned Judge left the case to the jury to say whether the obstruction complained of was in fact a nuisance, reserving the case on the points raised. The jury found the defendant guilty.

The objections taken at the trial were: 1. That the road was not a highway, being the road of an Incorporated Company.

2. Being the road of an incorporated company, the 104th section of the Joint Stock Company's Act, Consol. Stat. U. C. ch. 49, points out how the placing of an obstruction is to be punished, and it cannot therefore be the subject of an indictment.

3. That by the incorporation of the company this road became a private highway, and any obstruction of it could not be indicted as a public offence or nuisance.

Ernestus Crombie for the prosecution. It is undoubted law that an indictment will lie for obstructing a highway

which the evidence shews this was. Slight evidence of a road being a public highway will suffice : *Russell* on Crimes, 4th ed., vol. i., 461, *et seq.*, where the cases are collected. Next, if it is a highway, does the fact that it has been assumed by the Joint Stock Road Co. deprive it of its public character. Sec. 104 of the Joint Stock Act, Consol. Stat. U. C. ch. 49, is relied on to excuse the defendant, but the remedy given is cumulative. He cited *Rex v. Cross*, 3 Camp. 224, 227, and *Regina v. Inhabitants of Lordsmere*, 15 Q. B. 689.

No one appeared for the defendant.

MORRISON, J., delivered the judgment of the Court.

Under the circumstances, we are of opinion that the conviction was right.

By the Municipal Act, sec. 315 of the old Act and sec. 404 of the present Act: "All allowances made for roads, all roads * * laid out by virtue of any statute, or any roads whereon the public money has been expended, * * or whereon the statute labour hath been usually performed * * shall be deemed common and public highways."

Now, this portion of the Talbot Road and the side-road, both of which appear to have been obstructed by the erection of the platform and the steps leading to it, are public highways within the meaning of the Act.

Assuming the fact, which does not appear, that the road company in this case obtained authority to macadamize &c., a portion of this public highway, or allowance for road, we see nothing in any of the statutes to deprive the highway of its public character, or abridge or interfere with the rights of the public to the use and enjoyment of these highways; or entitle any private person to obstruct them by placing any erection or nuisance within their limits.

And as it clearly appears that the defendant obstructed a portion of the Talbot Road, as well as the side-road, and that the jury found it to be a nuisance, we are of opinion that the conviction should be affirmed.

Conviction affirmed.

MACNAUGHTON V. WIGG.

Lease—Covenant to pay taxes—Construction of.

Defendant in 1872, (the day and month not being given,) leased a farm from the plaintiff for a year from the 27th September 1872, and covenanted by the lease to pay during the said term "all taxes, rates * * assessments * * whatsoever, whether parliamentary, municipal or otherwise, which now are or which, during the continuance of the said term, * * shall at any time be rated, charged, assessed or imposed in respect of the said premises;" with a proviso for re-entry for breach of covenants.

Held, Wilson, J., dissentiente. that defendant was not liable for the taxes for 1872, which had been assessed against the plaintiff; for that the words "all rates, &c., which now are," referred to the kind or character of the tax assessable against the land, and the words "or which shall at any time," &c., to any other kind of taxes which might thereafter be imposed.

Per *Wilson, J.*, defendant was liable, the sum being a tax at the making of the lease charged in respect of the land. *Quære*, whether he would have been liable for any taxes for previous years unpaid.

EJECTMENT for broken lot 21, and part of 20, in the 7th concession of Douro.

The plaintiff claimed under a forfeiture for a breach or covenant to pay taxes.

The defendant claimed under a lease from the plaintiff.

The cause was tried before Richards, C. J., at the last Spring Assizes at Peterborough.

On the trial a lease was put in, executed by the defendant only, and dated 1872, not giving the day or month, for the premises in question, for a term of one year, to be computed from the 27th September, 1872.

The witnesses to the lease could not say when it was signed, and the plaintiff was not present at the execution.

The covenant to pay taxes on the part of the lessee, in the lease was as follows: "And also shall and will from time to time and at all times during the said term, well and truly pay, or cause to be paid, all taxes, rates * * assessments * * whatsoever, whether parliamentary or municipal or otherwise, which now are or which during the continuance of the said term hereby demised, shall at any time be rated, charged, assessed, or imposed for or in respect of the said demised premises, or any part thereof." Proviso, that in case of non-payment of rent * * or in case of breach of any of the covenants

herein contained, "then, and in any of the said cases, it shall be lawful for the said lessor * * into and upon the said premises * * to re-enter and the said lessee to expel," &c.

A certified copy of the assessment roll for 1872 was produced, and the plaintiff appeared as assessed for the premises in question as a freeholder and rated at \$360, no other person being assessed for it.

The collector for 1872 was called. He stated that he received the collector's roll on the 20th of October, 1872: that the taxes charged to the lot in question were \$13,44, and rated to the plaintiff: that the defendant being rated for some other land in the township, the collector finding him on the premises in question he demanded of the defendant payment of the taxes due by defendant on such other land, and he said he asked defendant who was to pay the taxes on the lot he was then living on, the premises in question. Defendant said he did not know, he was not going to pay them, that he did not have that year's crop off the place; and the collector asked where the plaintiff was. Defendant said in England. The witness said he gave the defendant no notice of these taxes and made no formal demand of them; that he, the witness, afterwards saw the plaintiff, who enquired if defendant had paid these taxes: that he stated to plaintiff what had occurred, when the plaintiff said that was all he wanted, that he would dispossess him, defendant; and that the plaintiff afterwards paid the taxes to the collector, about the 3rd of March. It appeared that three days statute labour was included in the amount of taxes charged against the lot.

At the close of the case several objections were taken against the plaintiff's right to recover on these facts.

The learned Chief Justice was of opinion that the execution of the lease by defendant sufficiently established his entry under it, but doubted as to the forfeiture, without some demand, or evidence as to possession when the assessment was made, and he entered a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him.

During Easter Term, 1873, *J. K. Kerr* obtained a rule *nisi* accordingly, on the ground that the plaintiff had a right of re-entry under the proviso contained in the lease for breach of the covenant to pay taxes.

In Michaelmas Term, 1873, *Hector Cameron*, Q. C., shewed cause. The by-law to raise the rate should have been proved. It was not sufficient to prove the collector's roll: *Taylor* on Evidence, vol. i., 6th ed. 413; *Rex v. Inhabitants of Coppull*, 2 East 25. Upon the reason of the thing the by-law should be produced. There may be a personal obligation to pay taxes, yet the premises may be free. Under sec. 94 of the "Assessment Act of 1869," there can be no forfeiture till demand, and there was no demand. "Now are" in the covenant is equivalent to "now are assessable." See the Act Respecting Short Forms of Leases. There are no taxes on the land till the roll is returned; until then it is a mere personal charge, an indirect charge. It was the plaintiff's duty to have paid the taxes, and then, if they were payable by us, to have demanded them from us. As a fact, the taxes were not paid until after action brought. He referred generally to *Hurst v. Hurst*, 4 Ex. 571; *Corbett v. Taylor*, 23 U. C. R. 454; *Doe dem. Palk v. Marchetti*, 1 B. & Ad. 720; *Woodfall*, L. & T., 10th ed., 724; *Cole* on Ejectment, 422; *Tidswell v. Whitworth*, L. R. 2 C. P. 326; *Swatman v. Ambler*, 8 Ex. 72; *Pitman v. Woodbury*, 3 Ex. 4; *Cardwell v. Lucas*, 2 M. & W. 111.

J. K. Kerr, contra. It is not necessary to prove the proceedings to impose the tax here, as it would be on a trial arising out of a tax sale. We are not called upon to do more, at all events, than shew a demand. There was a demand—an informal one—but which after the distinct refusal given to it was sufficient. [WILSON, J.—It would not have justified a distress.] A demand, however, we contend was not necessary. The Collector should have been sought out: *Davis v. Burrell*, 10 C. B. 821. If the taxes are a charge on the land the case may come within *Corbett v. Taylor*, 23 U. C. R. 454, and there may have been a forfeiture from

the beginning. The object of the covenant was, no doubt, that the tenant should pay two years' taxes. He cited *Hunter v. Hunter*, 4 Ex. 71; *Woodfall*, L. & T., 10th ed., 463; *Cole on Ejectment*, 422; *Ford v. Proudfoot*, 9 Grant 478; *Great Western R. W. Co. v. Rogers*, 27 U. C. R. 214.

MORRISON, J.—In this case the alleged forfeiture is the breach of a covenant in the defendant's lease to pay taxes, and in the first place we have to consider the nature of the covenant which the plaintiff charges the defendant has broken.

The words of the covenant are that the defendant, the lessee, "shall from time to time and at all times during the said term well and truly pay, or cause to be paid all rates, taxes, levies, duties, charges, assessments, and impositions, whatsoever, whether parliamentary, municipal, or otherwise, which now are or which during the continuance of the said term hereby demised shall at any time be rated, charged, assessed, or imposed, for or in respect of the said hereby demised premises, or any part thereof."

Several questions were raised upon the argument of the rule, but I do not think it necessary to consider them, as I am of opinion that the plaintiff cannot succeed unless the case shews that the taxes in question, which the defendant omitted to pay, were taxes he was bound to pay within the terms of his covenant.

The taxes in dispute were taxes which were assessed and charged against the plaintiff himself, we may assume, before the 15th April, 1872, the day upon which it was the duty of the assessor to have returned his roll completed, as required by sec. 49 of the Assessment Act, 32 Vic., ch. 36. Sec. 18 of that Act provides "that the taxes or rates imposed or levied for any year shall be considered to have been imposed, and to be due on and from the 1st day of January of the current year" (in this case 1872), "and ending with the 31st day of December thereof."

The defendant's lease was without date, but the tenancy commenced September, 1872.

It is therefore clear that the taxes in question were taxes which were imposed and charged against the plaintiff, and not against the defendant as lessee or occupier of the premises.

It was contended, on the part of the plaintiff, that nevertheless the words "now are," in the covenant, covered any taxes whatever that were at the date of the lease unpaid, and charged on the land, no matter when or against whom they may have been assessed or imposed. I cannot assent to so unreasonable a construction of the covenant.

In my opinion the words "now are" apply and refer to the kind, nature, or character of the tax, &c., then assessable or taxed in respect of the land, and the subsequent words, "or which during the continuance of the said term shall at any time be rated," &c., to all other additional kind of taxes that might be assessed or imposed thereafter. In other words, that the tenant should pay every kind of tax that, while he occupied the premises, was assessed upon them, but not that he should also pay any taxes that were rated and charged against a former occupant, or the plaintiff himself before the date of his lease.

I have not been able to find any cases bearing directly on the subject, except one, *Hurst v. Hurst*, 4 Ex. 571, which I think is an authority in favor of the defendant.

That was an action for breach of a covenant similar to the one before us, the words in that case being "as then were"—in this case "which now are."

Parke, B., in giving judgment, said, at p. 576: "The question is, whether these rates are such rates as, according to the true intent and meaning of the covenant, are 'imposed on the demised premises,' but which the defendants, by the terms of the covenant, ought to pay. I confess I have felt considerable doubt as to the meaning of the covenant. It is impossible to construe the words of it in their natural sense. Then, according to the rule adopted, if the words of a covenant are not applicable in their strict sense, we must see whether there is not a secondary sense which can be applied to them. Here I think there is. The defendants

covenant to pay 'all taxes, * * as then were or should at any time thereafter during the demise, be taxed, * * or imposed upon the said demised premises.' With respect to so much of the covenant as relates to taxes which should *thereafter* be imposed, if that had stood alone, the covenant would be construed in its strict sense, and the tenants would not be bound to pay any taxes, except those afterwards imposed by the Legislature on the land itself. That does not apply to the present case, and it is clear that the parties contemplated some taxes, * * *then* imposed on the demised premises, which the tenant was bound to pay. In truth, rates of this description are not imposed on the land itself, but on the occupier in respect of his occupation; so that the covenant cannot apply to rates assessed on the tenant to be recouped by his landlord; consequently, the language of the covenant is to be understood in its secondary sense, and as meaning rates not charged on the land itself, but on the occupier in respect of his occupation. The covenant to pay future rates enables us to read the words, 'or imposed,' as if they had been, 'or otherwise imposed,' so that the covenant may be construed as an undertaking to pay the rates then known, or any rates which might thereafter be imposed upon the demised premises. It is clear that the covenant was intended to operate so that the parties should pay the present rates, and we must understand the parties as having contemplated some other tax which might at a future period be imposed on the land itself. * * It must be construed as a covenant to pay all rates then imposed on the tenants in respect of their occupation of the land, and any future rates which might be imposed on the land itself."

I refer also to *Watson v. Atkins*, 3 B. & Al. 647, and to *Watson v. Home*, 7 B. & C. 285, which are cases bearing upon the construction of like covenants. Also to *Davenant v. Bishop of Salisbury*, 1 Vent. 223, 2 Lev. 68, where the covenant to pay all taxes during the term was held not to extend to a new tax created by Parliament, but must only be understood of such taxes as were then in use.

The true object of the covenant in this case was, no doubt, that the landlord was to receive the full amount of the rent without any deduction for taxes which were imposed on the premises during the tenancy of the defendant, but it can hardly be said that if the landlord neglected to pay taxes rated against himself while he was the occupier, say for one or two years, that by a covenant expressed as this one is, the tenant was to pay them.

In my opinion it would require express and unambiguous language to make the tenant so liable. To hold that such is the meaning of this covenant would be in effect to say that the first year's rent would be the amount reserved, plus the taxes in arrear at the time the lease was executed, and all further taxes assessed as against the lessee during that year.

As laid down in *Adams on Ejectment*, 4th ed., 133, "With respect to the construction of provisoes for re-entry for non-performance of covenants or conditions, no general principle can be laid down, except that which arises out of the maxim of our law, that every doubtful grant shall be construed in favor of the grantee," viz., that the breach complained of must come within the very letter of the covenant, or the lease will not be forfeited.

I may also say, that it appears clear to me, that if the defendant had paid the taxes in question he would have been entitled, under sec. 28 of the Assessment Act, referred to, to have deducted the amount from the rent.

On the whole, I am of opinion that the rule should be discharged.

RICHARDS, C. J., concurred.

WILSON, J.—The lease was prepared to take effect from the 22nd September, 1872, for one year. The lessor never executed the lease, but the tenant entered, so that a parol tenancy was created.

The clause which gives rise to the dispute between the parties is the one, that the tenant will, from time to time, and at all times during the term, well, and truly pay "all

taxes, rates, levies, duties, charges, assessments and impositions whatsoever, whether parliamentary, municipal or otherwise, which now are, or which, during the continuance of the said term hereby demised, shall, at any time, be rated, charged, assessed or imposed, for or in respect of the said hereby demised premises, or any part thereof." &c.

The defendant engaged to pay all the taxes *which now are* rated, &c., *or* which, during the term, should be rated.

The taxes in question are those for 1872, which were rated and imposed before the lease was made to the defendant, and at a time when the plaintiff was himself in possession of the land, as his name alone appears on the assessment roll as the freeholder of the premises.

The first question is, whether the defendant engaged to pay these taxes which were rated prior to the time of his own lease *for or in respect of the said* demised premises and which at the time of the lease were still unpaid.

It was argued that the tenant did not engage to pay any *debt* in respect of taxes heretofore imposed, and then unpaid, but only to pay such taxes which were rated during his own time, if they were of the same kind which at the time of the making of the lease affected the land, or which at any time during the term should affect the land: that the engagement only applied to the quality and description of the taxes to be paid, and which quality and description were to be ascertained by a reference to those which at the time of the making of the lease, or at any time during the term, were imposed for or in respect of the land; and that the defendant could only be required to pay for the taxes which were imposed during his own term, and not for those which might have been in arrear for years before he entered.

I am not able to say I am satisfied with that reasoning.

I rather think that the defendant bound himself to pay not merely such taxes as those that are referred to *which were imposed during his term*, but to pay also *the amount of* those taxes which were imposed for or in respect of the land at the time of the making of the

lease,—that is, the then current year's taxes, if they were still unpaid.

The taxes in question were made for or in respect of the land. They are a lien upon the land, and the goods of any one in possession may be distrained on for them. The landlord may desire that his tenant shall free the land from such a burden, and also all future tenants from the fear or chance of a distress, or any other trouble on that account.

The hardship in this particular case is, that these are the landlord's own taxes, and which he knew were not paid at the time of the making of the lease, and which the tenant knew nothing of, and which the landlord probably knew the tenant had no idea he was entering into any engagement to pay; and their non-payment is made the excuse of his forfeiture of the term.

If the landlord had not been the person who was rated for the former taxes, and if the land had been on lease to others for a number of years, the landlord might not know as a fact whether the taxes had been fully or punctually paid or not, and he might, in all fairness, take such a covenant as this for the protection and preservation of his land from sale.

Or a mortgagee might take such a covenant from the mortgagor.

Or an unpaid vendor, from a vendee—and he might do that for the purpose of securing the payment of all former years' rates, as well as those of the then current year.

One who covenants to keep in repair must forthwith put the premises into repair, although they were out of repair when he took them: *Payne v. Haine*, 16 M. & W. 541.

I think the covenant to pay all rates, &c., which now are charged, &c., do point to a claim for so much money, which is a charge for or in respect of the land, and that it may properly apply to the then current year's taxes, which had not then been paid, because they are in truth charged for or in respect of the land, and they may reasonably have been in the contemplation of the parties, and they

may have wished to provide for what might otherwise have been a debatable point,—which of them should pay the taxes for the year in which the lease was taken.

I should doubt, unless the very plainest language were used, expressly applicable to prior years' rates, whether they could be held to be within the words of this lease; but such previous years' rates are not in question.

The taxes in question being a charge here upon the land shew, in my opinion, that *Hurst v. Hurst*, 4 Ex. 571, is a decision in favour of the plaintiff.

Rule discharged.

WARD V. THE MIDLAND RAILWAY OF CANADA,

Midland R. W. Co.—10 Vic. ch. 109—Registry fees on deeds.

By the 10 Vic. ch. 109, the Registrar was entitled to receive only the sum of 2s. 6d. from defendants for registering deeds made to them in the form given by the Act. In 1865 the Registry law was changed, and deeds were required to be registered in full, instead of by memorial, as before. In 1873 and 1874 defendants brought for registry deeds made to them, which contained covenants for title not in the statutory form. *Held*, that for such deeds the Registrar was entitled to charge his full fees, and was not restricted to the 2s. 6d.

SPECIAL CASE.—This action was brought to recover \$222,50 with interest, which the plaintiff claimed for his fees upon and for the registration in the Registry Office of the East Riding of the County of Durham, at the request of the defendants, of certain deeds of conveyance made by various persons to "The Peterborough and Port Hope Railway Company," "The Port Hope, Lindsay, and Beaverton Railway Company," and "The Midland Railway of Canada," and for searches and other services rendered by the plaintiff, as Registrar of that Riding, for the defendants at their request.

A special case was stated for the opinion of the Court, under the C. P. L. Act, sec. 154, of which the following are the material facts:—

The plaintiff was at the time of the registration of the said deeds, and has continued to be, and still is, the Registrar of the East Riding of the County of Durham, and "The Peterborough and Port Hope Railway Company" became "The Port Hope Lindsay and Beaverton Railway Company," which afterwards became, and now is, "The Midland Railway of Canada."

The said deeds were in December, 1873, and January, 1874, duly registered by the plaintiff in the said Registry Office in the manner provided by "The Registration of Titles (Ontario) Act," and were registered at full length, including the affidavits of execution, and certificates of proof of execution endorsed thereon.

The said deeds (with the exception of six, which are in the form given in the schedule of 10 Vic. ch. 109, and which have affidavits of execution endorsed on them,) were in the form following, that is to say:—

"Know all men by these presents that I, A. B., of, &c., do hereby, in consideration of [the sum of ——— lawful money of Canada,] paid to me by "The Peterborough and Port Hope Railway Company," (or P. H. L. & B. R. W. Co.,) "the receipt whereof is hereby acknowledged, grant, bargain, sell, convey, and confirm unto the said "The Peterborough and Port Hope Railway Company," (or P. H. L. & B. R. W. Co.) their successors and assigns, forever, all that certain parcel of land situate (*here describe the land*) [containing by admeasurement ——— more or less, which parcel or tract of land and premises may be better known and ascertained as the same is described and laid down on a plan of the said railway, as it runs through the said town of ——— and as the line is marked and coloured in pink on the said plan, which is deposited or is to be deposited in the Registry Office for the County of ——— by the said Company,] the same having been selected and laid down by the said Company for the purposes of their road. To have and to hold the said land and premises, together with the hereditaments and appurtenances thereto, to the said "The Peterborough and Port Hope Railway Company," (or P. H. L. & B. R. W. Co.,) their successors and assigns forever, [free from all incumbrances. And I do hereby for myself and my heirs

covenant with the said company, their successors and assigns, that I now have the right to convey the said lands free from all incumbrances; and that I have done no act to incumber the said lands. Also know ye that I—— wife of the said——in consideration of five shillings paid to me by the said company, the receipt whereof is hereby acknowledged, do hereby release unto the said company, their successors and assigns, all dower in the said premises.]

Witness my hand and seal this——day of——in the year of our Lord, one thousand eight hundred and ——

Signed, sealed and delivered —— in presence of
 ——.” L. S.

With the exception of the words included in brackets, the form corresponded with that given in the statute.

Sixty-two of the said deeds had endorsed upon each of them an affidavit of the due execution thereof, and other seventy-five of them had endorsed upon them a certificate of proof of execution under sec. 45 of “The Registration of Titles (Ontario) Act.”

It was contended for the plaintiff that he was entitled to receive from the defendants, for the registration of the said deeds by him as aforesaid, the fees allowed by “The Registration of Titles (Ontario) Act;” while the defendants contended that under 10 Vic. ch. 109, sec. 11, they were only liable to pay the sum of fifty cents for each of such deeds, and no more.

The question for the opinion of the Court was, what fees the plaintiff was entitled to receive?

If the Court should be of opinion that the plaintiff's contention was correct, judgment was to be entered for the plaintiff for \$227.00 damages, and his costs.

If the Court should be of opinion that the defendants' contention was correct, judgment was to be entered for the plaintiff for \$93 00 damages, without costs.

If the Court should be of opinion that the plaintiff's contention was in part correct and in part incorrect, judgment was to be entered for the plaintiff for such amount of damages as Mr. Seth S. Smith of Port Hope, barrister-at-law, should under the opinion of the Court direct, with costs.

T. M. Benson, for the plaintiff. Only six out of about 150 deeds are in the form given in the schedule to the Act incorporating the original Railway Company, of which the defendants are successors—10 Vic. ch. 109,—and it was only such deeds as did correspond with the form given in the schedule that the Registrar was bound to register for 2s. 6d. under sec. 11 of the Act referred to. Where any thing is added, the deed is registered under the Registry Act, and subject to the ordinary fees. The majority of these deeds have covenants introduced and other material changes. The system under which registration is now effected, by which the deed is required to be registered in full, should be taken into consideration. The Legislature, if this system had been in use, would probably have fixed a higher rate of remuneration. It is submitted that the effect of this change of system is to repeal the former special enactment. See the Ontario Registry Act, secs. 2, 52.

C. S. Patterson, Q. C., contra. The statutory form contains 130 words; the additional covenants 49 words, and the bar of dower 48; and for these 97 added words the plaintiff seeks to increase the charge from 50c. to \$1.40. If the Legislature has made the duty of the Registrar more onerous, it is for him to bear it. The Acts since the Registry Act, 31 Vic. ch. 20, O., as to railway companies, still repeat in effect the section these defendants register under. See 34 Vic. chs. 36, 46, 53. In ch. 46 the clause in this Act is repeated *verbatim*. There has been therefore no change of policy as to charges for registration of railway deeds, and the defendants' Act in this respect cannot be said to be repealed.

RICHARDS, C. J., delivered the judgment of the Court.

Under sec. 11 of the Provincial Statute, 10 Vic. ch. 109, the defendants' company are to pay to the Registrar for entering in his register book such deeds as are made, (as far as the title to the land or the circumstances of the party making such conveyance will permit,) in the form

given in the Schedule to the Act marked A, the sum of two shillings and sixpence, and no more.

The form annexed to the said statute does not contain covenants for title, which are introduced into all the deeds registered by the plaintiff for the defendants but six, and others in addition contain releases of dower.

The deeds were registered in December, 1873, and January, 1874, more than twenty years after the passing of defendants act of incorporation, which contains the clause compelling the Registrar to register the deeds in the prescribed form for fifty cents.

By the Registry Act of 1865, the mode of registering deeds was changed, and by the law in force at the time the deeds were presented by defendants for registry the Registrar was obliged to copy the deeds into his books at full length, including every certificate and affidavit accompanying the same,

The ordinary affidavit of the execution of the deed would probably contain about a hundred words, and the words of the form of the deed appended to the statute contain, independent of the name and description, about a hundred and thirty words.

The defendants contend, that as the Legislature have made it necessary under the changed system of registry to register these affidavits and certificates, the plaintiff must nevertheless do that additional work without any additional compensation, the statute not in any way providing for it.

The answer to this is, that if the Legislature has changed the mode of registry they have not enacted that the defendants may add covenants for title to their deeds, and then compel the Registrar to register the deed so altered for two shillings and sixpence.

The Registry Act of 1868, sec. 36, allows the registration of all instruments made before the 1st of January, 1866, to be made in like manner through memorials, or by certificate or otherwise as provided by the law in force before the passing of the Registry Act of 1865; and the proof that would have

been sufficient for the registration of any instrument before the 1st of January, 1856, is to be sufficient for the registration of such instrument at any time thereafter, if the same were executed before the 1st of January, 1866; but in any such case the instrument must be registered *at full length*, and the memorial and affidavit are to be deposited in lieu of an original or duplicate.

The defendants have waited more than twenty years since their Act was passed before calling on the Registrar to register these deeds. In the mean time the Legislature has made it necessary properly to register a deed, that not only the deed itself, but the affidavit or affidavits of the due execution thereof, should be registered.

The defendants say to the plaintiff "This additional labour is imposed on you by the Act of Legislature, and no compensation, as far as our deeds are concerned, is allowed to you for the additional labor."

The plaintiff's answer is, "The deed you have requested me to register is not *such* a deed as your act of incorporation requires me to register for two shillings and sixpence and no more. If you require that I should discharge the additional labour which the Legislature has cast upon me without compensation, my reply is that the Legislature does not compel me to register *this* deed for fifty cents."

We think the plaintiff is right. The defendants for their own security and advantage take a covenant from the grantor in their deeds, which the form in the statute does not contain, and they choose to wait for more than twenty years, until the Legislature have by the change of the system of registration imposed a greater labour on the Registrar in registering the deeds, and then ask to have the work done at the same rate as if they had made their deeds in the manner and had them registered at the time when the Legislature thought that two shillings and sixpence was a reasonable compensation for the labour.

We see no reason why these defendants should be allowed to deprive a public officer of his reasonable fees, when they by their own delays have virtually cast addi-

tional labour upon him to discharge his duty in registering their deeds.

We would not do so unless compelled by the strict letter of the law, and we think we uphold the law in its letter and spirit when we decide that for registering the defendants' deeds, those deeds not strictly complying with the form in the statute, the defendants must pay the fees at the same rate as any other party for whom the Registrar may be called on to register a deed.

The result will be that the plaintiff's claim of \$222 will be reduced by the amount which was charged for registering the six deeds that are in the form prescribed by the statute exceeding the sum of \$3; or, in other words, we think that the plaintiff's claim should be allowed in this way.

Allow him his full fees on all the deeds registered, which we understand is.....\$227 00

Deduct therefrom the amount charged for registering the six deeds which are in the form prescribed by the statute.....\$

Less for the six deeds 50c. each, as allowed by the statute..... \$3 00

Balance \$

The plaintiff will then be at liberty to enter judgment for \$, with costs.

Judgment for plaintiff.

NICKLE V. DOUGLAS.

“Assessment Act of 1869”—Bank stock owned out of the Province—Omission of assessor to complete roll in time—Effect of—Demurrer.

Under 32 Vic. ch. 36, O., bank stock is personal property liable to assessment.

Stock held by a resident of Kingston in the Merchants Bank, which has its chief place of business in Montreal: *Held*, to be personal property owned out of the Province, and therefore exempt; for it was owned by such resident, so far as the Assessment Act was concerned, at the head or chief place of business of the bank.

Quære, whether the Sheriff could seize and sell such stock, merely because it might, if the Directors chose, be made transferable at a branch office.

Where bank stock not assessable, because owned out of the Province, was assessed with other personal property from which it was stated as severable by the pleadings, and such assessment was confirmed by the Court of Revision and County Judge : *Held*, on demurrer, in replevin for goods distrained, that the defect of want of jurisdiction was not cured.

The omission of assessors in a city to make and complete the roll until after the 1st of May, does not avoid the assessment; and the person assessed having appealed to the Court of Revision and County Judge, paid part of his taxes, and refused to pay the rest on a ground inconsistent with this objection, would be precluded from taking it.

Remarks as to the unnecessary mass of pleadings on the case.

DEMURRER.—Declaration in replevin for one stove and pipes, five hair-bottomed chairs, one hair sofa, one piano, &c.

Avowry : That in 1873 the Council of the Corporation of the City of Kingston duly enacted a by-law lawfully authorizing the levy and collection of a rate of one cent and six mills on the \$ upon the assessed value of all the ratable real and personal property in the municipality : that the clerk of the said city in the said year made out the collector's rolls for the year as required by law for each ward, for the collection of said rates in accordance with the said by-law : that W. P. Minnes was the tax collector of the said municipality for the said year, having been duly appointed by the said Council, and the collector's rolls aforesaid were then delivered to the said collector by the said clerk for the collection of the rates therein set down : that in the collector's roll for Sydenham Ward in said city for said year so delivered to the collector as aforesaid, the plaintiff, a resident of the said municipality, is set down and assessed as owner of certain ratable real and personal property in the said municipality, at the value of \$27,832; that the rate of one cent and six mills in the \$ hereinbefore mentioned on said assessment of \$27,832 amounts to \$445, 31 cents and 2 mills, which was the tax for the said year set down on said roll against the plaintiff in respect of the aforesaid property : that as collector the said W. P. Minnes duly demanded the payment of the said tax from the plaintiff, who paid on account of the said tax \$80, and left a balance of \$365 31 cents and 2 mills of the said tax unpaid; and fourteen days having elapsed from the

time of the said demand made as aforesaid, and payment of the said balance of the said tax not having been made, and the said collector having possession of the collector's roll aforesaid for the collection of the rates therein set down as aforesaid, he, the said collector, by his warrant under his hand and seal, thereupon duly authorized the defendant, as his bailiff, to levy and collect the said balance of the said tax from the goods of the plaintiff; and the said defendant thereupon, as the bailiff of the said collector, and under and by virtue of the said warrant and authority, took, and he well acknowledges as such bailiff the taking of, the said goods, &c., as a distress for the said balance of the said tax so demanded as aforesaid, and which still remains due and unpaid.

Second plea to the avowry: that the assessors of the said municipality for the year 1873 did not make or complete their rolls in the said year between the first day of February and the first day of May in the said year, being the time limited by law for the making and completing of their said rolls as aforesaid; and that they did not attach to the said rolls the certificate in the form and as required by law, signed by them respectively, and verified upon oath or affirmation, pursuant to the statute.

Second replication to the second plea: that the said assessors duly made and completed their said rolls and attached thereto the certificate required by law, duly signed and verified by them, by the 21st day of May last past; and the plaintiff had from the said day ample time to allow of his duly appealing, according to law, against his said assessment; and the plaintiff was not prevented from so appealing by such delay in the completion of the said rolls, after the said 1st day of May, nor was the plaintiff or any other person otherwise in any way injured or prejudiced by such delay; and the plaintiff did in fact so appeal, but was unsuccessful upon the merits as to the property the assessment of and tax upon which is in question in this cause.

Demurrer to the second replication, because: 1. The said replication admits the non-compliance with the statute known as the Assessment Act of 1869, by the assessors, and in no manner justifies or answers the same.

2. The said replication confesses the cause of action in the said plea alleged without avoiding the same.

3. The said replication is no answer to the said plea, but is pleaded in reduction of damages only.

4. The Court of Revision had no jurisdiction to entertain or decide on the non-completion of the assessment rolls and the non-attaching of the certificate as in the said plea is set forth.

Third plea: that after the assessors in the first plea mentioned had made and completed their rolls for the said municipality for the year 1873, and after the first day of May in the said year, they, the said assessors, entered on said rolls the said plaintiff as the owner of certain other personal property in the said municipality, and being part of the personal property in the said avowry mentioned, to the value of the sum of \$19,352, part of the said sum of \$27,832, and that the rate in the said avowry mentioned on the said sum of \$19,352, amounts to the sum of \$355 31 cents and 2 mills in said avowry mentioned, and none other.

Third replication to the third plea: that the said assessors entered and assessed the plaintiff in the said rolls before the completion of the same as in the second replication mentioned, and the plaintiff was not injured or prejudiced in any respect or deprived of any rights by such delay in the completion of the said rolls after the said 1st day of May.

Demurrer to the third replication, on the same grounds as taken to the second replication.

Fourth plea: that the sum of \$365 31 cents and 2 mills, in the said avowry mentioned, was the tax for the said year 1873, on the said sum of \$19,352, parcel of the said sum of \$27,832 at the rate in the said avowry mentioned, as set down in the collector's roll aforesaid against the plaintiff in respect only of certain personal property of the

plaintiff not liable to taxation, being certain stock to the value of \$19,352, held by the plaintiff in a chartered bank.

Fifth plea: that the sum of \$365 31 cents and 2 mills in the said avowry mentioned was the tax for the said year 1873 on the sum of \$19,352, parcel of the said sum of \$27,832, at the rate in the said avowry mentioned, as set down in the collector's rolls aforesaid against the plaintiff in respect only of certain personal property of the plaintiff, not liable to taxation, being certain stock to the value of \$19,352 held by the plaintiff in a chartered bank, that is to say, in the Merchants' Bank of Canada, and which said stock is personal property owned out of the Province of Ontario, and not liable to taxation.

Fourth replication to the fourth and fifth pleas: that in and during the year 1873 the plaintiff was a resident and domiciled and had a place of business within the municipality of the City of Kingston, and was the owner of the bank stocks in the said fourth and fifth pleas mentioned when he was assessed therefor, which was in the said year 1873, and the said banks were not in or during the said year subject by law to or liable to pay to the Government a special tax on their issues or average circulation, and the said bank stocks were personal property.

Demurrer to the fourth replication on the grounds:—

1. That there is no law passed by the Parliament of Canada imposing any tax upon bank stocks or authorizing the assessing and collecting of any tax thereon.

2. That under and by virtue of the "British North America Act, 1867," the jurisdiction over banks and the incorporation of banks is not within the scope of the Legislative powers conferred on the Legislature of Ontario, and that any Act relating to the assessment and taxation of bank stock passed by the Local Legislature of Ontario is invalid, it being under the Assessment Act of 1869, an Act passed by the Local Legislature of Ontario, the defendant justifies.

3. That there is no law in force authorizing the taxation of stock in chartered banks.

4. That the said replication does not allege that the said personal property was owned within this Province.

5. It does not allege that the plaintiff was duly entered upon the assessment rolls for and in respect of the said bank stock between the first day of February and the first day of May in the said year.

Fifth replication to all the pleas: that after the plaintiff had been notified of his assessment as in the first replication mentioned, he appealed from and against the same to the Court of Revision, which Court duly sat for hearing appeals in said year, and all necessary proceedings were had, and the plaintiff had due notice when such appeal would come on, and the plaintiff failed to prosecute his said appeal as to the property the assessment of which and the tax thereupon is in question in this cause, and the said Court proceeded to determine the said appeal as to the said property, and the same was duly determined against the plaintiff; and the said rolls as finally passed by the said Court and certified by the City Clerk contain the assessment of the said property unchanged against the plaintiff.

Sixth replication to all the said pleas: that after the plaintiff had been notified of his assessment as aforesaid he appealed from and against the same to the Court of Revision, which Court duly sat for hearing appeals in said year, and all necessary proceedings were had, and the plaintiff duly appeared before the Court and was duly heard in the matter of said appeal, with such witnesses and evidence as he then and there adduced; and the said Court having duly heard and considered the said appeal, reduced the plaintiff's assessment as to certain real property, and determined the said appeal against the plaintiff as to the property the assessment of which and the tax thereupon is in question in this cause, and confirmed the assessment of the plaintiff in respect of the said last mentioned property, and the said rolls as finally passed by the said Court and certified by the City Clerk contains the assessment of the said last mentioned property against the plaintiff unchanged.

Demurrer to the fifth and sixth replications, on the grounds: 1. That although the said rolls containing the assessment of the plaintiff complained against in the said pleas, were finally passed by the said Court of Revision and certified by the said City Clerk, yet the same is not binding upon the plaintiff; the property assessed in said pleas mentioned being by law exempt from assessment and taxation, cannot by the said proceedings on the part of the plaintiff, or by any action or proceeding of the assessors or the Court of Revision or the City Clerk, be made liable to assessment or taxation.

Seventh replication to all the said pleas: The same as the sixth replication, and concluding—and thereupon the plaintiff appealed from the decision of the said Court as to the last mentioned property to the County Judge of the County of Frontenac, and all necessary proceedings were thereupon had, and the plaintiff duly appeared before the said Judge, who duly heard him and such witnesses and evidence as he adduced before the said Judge in the matter of the said appeal, and the said Judge having duly heard and considered the said appeal determined and decided the same against the plaintiff, and confirmed thereby the plaintiff's assessment for the said last mentioned property, and the said rolls, as returned to the said clerk finally revised and corrected according to law, contain the assessment of the said last mentioned property against the plaintiff unchanged.

Eighth replication to all the said pleas: that the plaintiff, having appealed against his said assessment as in the foregoing replication mentioned, it was agreed by and between him and the respondents in the said appeal, that as to the assessment of the property the assessment of which is in question in this cause, the final decision in certain other appeals of a similar nature by other persons as to similar property, being bank stocks assessed in the said municipality, should, as to the right to assess bank stocks as they had been assessed in the said municipality, be decisive of the plaintiff's appeal as to the aforesaid property. And the

defendant says that the final and ultimate decision by the proper authority in the said appeals of said persons, who were duly heard therein, was against the said appeals, and to the effect that said bank stocks were assessable, as the same had been assessed in the said municipality; and the plaintiff's assessment for the property aforesaid was confirmed accordingly, and said rolls, as finally passed, revised, and corrected, contain the assessment of said plaintiff for the property aforesaid unchanged.

Demurrer to the seventh and eighth replications, on the same grounds taken to the fifth and sixth replications.

Rejoinder to the fourth {replication : that the stocks in the chartered bank in the said fourth and fifth pleas mentioned are the stocks of the Merchants Bank of Canada, and that the chief place or seat of business and the head office of the said bank is situate out of the Province of Ontario, that is to say, in the Province of Quebec, and that the said stocks are transferable only at the said office and not elsewhere, and not in the Province of Ontario, and such stocks are therefore personal property owned out of this Province, within the meaning of the Assessment Act of 1869, and therefore exempt from assessment and taxation.

Demurrer to the said rejoinder, on the grounds:—
1 That if the said property were exempt from assessment and taxation as stated, the plaintiff's only remedy was by appeal under the Assessment Act.

2. That the plaintiff, being a resident of the City of Kingston, the assessors had jurisdiction to assess him, and the rolls as finally passed are conclusive against him.

3. That personal property follows the person, and has no locality except the domicile of the owner.

4. That all personal property must be assessed at the residence or place of business of the owner, and it does not appear that the plaintiff had any residence or place of business out of the City of Kingston, or that the property was assessed elsewhere.

5. That it is of no consequence where the office for the transfer of such stock is, so long as the owner resides or has a place of business within the City of Kingston.

6. That, the bank charters extending over the whole Dominion, the stock is wherever the owner has his fixed domicile in the Dominion.

7. That it is a sufficient justification for the levy by the defendant as the collector's bailiff that the plaintiff remained assessed for the said property on the assessment rolls as finally passed, and appeared set down and taxed therefor on the collector's roll as in defendant's cognizance alleged.

8. That the special tax on bank issues having been abolished, the said bank stock was not exempt from assessment and taxation in the year 1873.

The defendant gave notice of exception to the first part of the second plea: that it is no answer to the defendant's cognisance, and that if it were true the assessment would still be legal and binding.

And to the fourth and fifth pleas: that the plaintiff's only remedy was by appeal under the Assessment Act if the property was exempt from assessment and taxation: that the plaintiff being a resident of the City of Kingston, the assessors had jurisdiction to assess him, and the plaintiff is bound by the assessment roll as finally passed: that the special tax on bank issues having been abolished, the bank stocks in these pleas mentioned were not exempt from assessment and taxation, and it is not stated that the said bank did not do business or had not offices in this Province, and said banks are by law authorized to do business in any place in the Dominion: that personal property follows the person: that all personal property must be assessed at the owner's place of business or residence.

And to all the said pleas excepted to: that the fact of the plaintiff remaining on the assessment rolls when finally passed, and appearing on the collector's roll as assessed for the said property, is a sufficient justification for the defendant as bailiff of the collector in making the levy.

MacLennan, Q. C., for the defendant. The rolls as finally revised are conclusive whenever the municipality has jurisdiction over the subject of assessment. The cases

applicable to this point are: *McCarrall v. Watkins*, 19 U. C. R. 248; *The Corporation of the City of Toronto v. Great Western R. W. Co.*, 25 U. C. R. 570; *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263; *Marshall v. Pitman*, 9 Bing. 595; *Allen v. Sharp*, 2 Ex. 352; *Pedley v. Davis*, 10 C. B. N. S. 492; *Churchwardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868; *Durrant v. Boys*, 6 T. R. 580; *Hutchins v. Chambers*, 1 Burr. 579; *Brittain v. Kinnaird*, 1 B. & B. 432; *The Niagara Falls, Suspension Bridge Co. v. Gardner* 29 U. C. R. 194; *Patchett v. Bancroft*, 7 T. R. 367; *Municipality of Berlin v. Grange*, 1 E. & A. 279; *Law Society of Upper Canada v. The Corporation of the City of Toronto*, 25 U. C. R. 199.

The time within which the assessment rolls were to be completed and returned by the assessors is directory only, and a return made after that day is sufficient: *Rex v. The Mayor, &c., of Norwich*, 1 B. & Ad. 310; *Regina v. The Mayor, &c., of Rochester*, 7 E. & B. 910. The assessor is subject to severe penalties if he fail to perform his duty: 32 Vic. ch. 36, O., secs. 175, *et seq.*, and the penalty may attach to him; but his act would be valid though done after the proper day: *Hunt v. Hibbs*, 5 H. & N. 123, 128.

The collector's roll is a protection to the collector and all who act under him, so long as the roll is in his possession: *Spry v. McKenzie*, 18 U. C. R. 161; *Pedley v. Davis*, 10 C. B. N. S. 492.

The plaintiff further says that the bank stock for which he was assessed, was not a kind of property which was assessable. In the fifth plea he says the stock was shares in the Merchants' Bank, which were personal property owned out of this Province, and so not liable to be assessed.

It will be contended by the plaintiff that the Legislature of Ontario had no right, by the Assessment Act of 1869, to subject bank stock, whether by special or general terms, to assessment for taxes, because the Confederation Act, sec. 91, sub-sec. 15, gives exclusive jurisdiction to the Parliament of Canada over the class of subjects enumerated under

the head of "Banking, incorporation of banks, and the issue of paper money."

But such an argument cannot be supported to such an extent, because the Dominion Parliament has exclusive jurisdiction also over "The regulation of trade and commerce;" and it is impossible to maintain that the Ontario Legislature is thereby deprived of all right of dealing with the various articles of trade and commerce for local purposes, and of directing which of them shall, and to what extent, be subject to assessment, or be otherwise dealt with according to our local wants, while the Ontario Legislature has exclusive jurisdiction over property and civil rights in the Province.

Bank stock was always personal property within the meaning of the assessment laws. It was exempted from taxation before 1873. The last Assessment Act before that year was the 32 Vic. ch. 36, O. which by sec. 9, sub-sec. 16, enacts that "The stock held by any person in any chartered bank so long as there is a tax on bank issues, but not the dividends thereof," shall not be taxable. The limitation or the restriction of taxing bank stock was removed by the Dominion Act, 34 Vic., ch. 5, sec. 15, which declares that "Every bank to which this Act applies," (and the bank in question is within it,) "shall be exempt from the tax now imposed on the average amount of its notes in circulation, to which other banks will continue liable, and from the obligation to hold any portion of its capital in Government debentures or debentures of any kind."

When that was done, the exemption under the Assessment Act was determined, and bank stock became liable to assessment like any other personal property.

The dividends on such stock, while the stock itself was exempt from rating, were ratable. In that way it may be said the subject was not beyond the jurisdiction of the municipality to assess, and the question became one only of amount; and as to that, the decision of the Court of Revision or of the County Court Judge is final and conclusive by the express terms of the Act: 32 Vic., ch. 36, secs. 61, 69, O.

The 36th section of that Act subjects the value of the

stock or shares held by each shareholder in an incorporated company to assessment as part of his personal property, unless it is exempted by the Act; and it declares that the personal property of the incorporated Company shall not be assessed against the corporation.

And sec. 39 declares that "Every person having a farm, shop, factory, office, or other place of business, where he carries on a trade, profession, or calling, shall, for all personal property owned by him, wheresoever situate, be assessed in the municipality or ward where he has such place of business, at the time when the assessment is made."

Sec. 40 provides for the case of the person having two or more places of business in different municipalities or wards,—which does not apply here.

And sec. 41 declares that "If any person has no place of business, he shall be assessed at his place of residence."

The plaintiff was, in pursuance of that enactment, assessed for his bank stock at the city of Kingston, which is his place of residence.

The plaintiff will rely strongly, no doubt, on the enactment among the list of exemptions in sec. 9, sub-sec. 18 of the Assessment Act, that "all property, real or personal, which is owned out of this Province," is not taxable; and that this stock, being shares in a chartered bank which has its head or chief place of business in Montreal, in the Province of Quebec, is therefore exempt.

But bank stock is a chose in action, and has no locality but that of the proprietor of it, and wherever he is, there the stock is too; he represents it.

The charter of this bank, 24 Vic., ch. 89, sec. 19, states expressly that the stock shall be personal estate, and be transmissible accordingly. The Consol. Stat. C., ch. 70, declares that shares and dividends in such corporations shall also be considered to be personal property, and shall be liable as such to *bonâ fide* creditors for debts, and may be attached, seized and sold under writs of execution, in like manner as other personal property may be sold under execution.

By sec. 3 of that Act, the seizure is effected by the sheriff serving a copy of the writ on the company, with a notice that all the shares of the defendant are seized; and by sec. 5, the shares shall be held to be personal property found by the sheriff in the place where notice of the seizure thereof may be made as aforesaid.

By sec. 4 it is provided that if the company has more than one place where service of process may legally be made upon them, and there is some place where transfers of stock may be notified to and entered by the company, so as to be valid as regards the company, or where dividends or profits on stock may be paid other than the place where service of such notice has been made, the notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place, so as to subject the company to pay twice, or to affect the rights of any *bonâ fide* purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of such service by post from the place where it was made to such other place.

George A. Kirkpatrick, contra. The case depends chiefly on the defendant's demurrer to the plaintiff's rejoinder, which sets up that the stock was held in a bank that had its place of business out of Ontario.

The right of rating depends entirely on jurisdiction: *Great Western R. W. Co., v. Rouse*, 15 U. C. R. 168; *Municipality of the Township of London v. The Great Western R. W. Co.*, 17 U. C. R. 264; *Shaw v. Shaw*, 12 C. P. 456; *Shaw v. Shaw*, 21 U. C. R. 432; *Charleton v. Alway*, 11 A. & E. 993, 999; *Regina v. The Court of Revision of the Town of Cornwall*, 25 U. C. R. 286; *The Niagara Falls Suspension Bridge Co., v. Gardner*, 29 U. C. R. 194; *The Great Western R. W. Co. v. Rogers*, 29 U. C. R. 245.

If the property be exempt from taxation, these cases plainly show that the rating it is an unauthorized and illegal act.

This is not a question of overcharge only. The property itself,—the particular kind over which authority has been assumed,—is not within the power of the municipality.

The Merchants' Bank, by 31 Vic., ch. 84, sec. 6, has its chief place or seat of business in Montreal; but it may have branches or offices of discount and deposit in other cities, towns and places in the Dominion.

By sec. 19, the shares are personal estate, and transmissible accordingly. And the stock and dividends are transferable and payable at the chief office of the bank in Montreal, although they may be transferred and made payable in the United Kingdom in like manner as at the head office.

The shares at the head office must, to be valid, be made and registered in a book for the purpose. The sheriff, when he sells any of the shares, shall, within thirty days after the sale, leave with the cashier of the corporation an attested copy of the writ, with a certificate of the sheriff certifying to whom the sale has been made; and thereupon, but not till all debts due by the original holder of the shares to the corporation have been discharged, the president or vice-president, or cashier of the corporation shall execute the transfer of the shares to the purchaser.

This is a charge which is sought to be imposed upon the plaintiff, and the Act therefore must be strictly construed against the municipality. If there is an ambiguity, the doubt is given in favour of the subject: *The Dock Co. at Kingston-on-Hull v. Browne*, 2 B. & Ad. 43, 58.

The 35th section of the last mentioned Act gives the right and power to the Superior Court of the Province of Quebec to adjudicate in all cases of doubt between the bank and others respecting the legality of any claim to or upon shares or dividends of the bank; and that shews that the sheriffs in this Province were not empowered to interfere with property which was alone to be adjudicated upon by a Court in another province. And if the sheriff cannot sell such stock, much of the argument for the defendants has been defeated. The point as to the subject being within the scope of the Dominion Parliament need not now be argued, because the bank has not been rated, but the stockholder only: *McCulloch v. The State Maryland*, 4 Wheat. 316, is applicable.

The bank stock was added by the assessor to the roll after the first of May, the time by which he should have completed the roll. The notices of the assessment having been made were not given until the 21st of May. *The Municipality of the Township of London v. The Great Western R. W. Co.*, 16 U. C. R. 500, shews the party assessed may resist payment if he have not been duly notified. See, also, *The Mayor, &c., of Rochester v. The Queen*, E. B. & E. 1024.

MacLennan, in reply. It is admitted, if the Judge had no authority, his decision is not conclusive; if he had, it is conclusive. Now the pleas shew the plaintiff paid a part, so that it is a question of amount only. [*Kirkpatrick*, the conusance shews the plaintiff was assessed for his real and personal property, and what the plaintiff paid was the tax upon his real property.]

If the plaintiff were assessable for any item of personal property, and if there are any of them which were not assessable, the Judge, having jurisdiction over personal property, has in fact been dealing with the *amount* of rate; and he has not adjudicated upon or against property which was not assessable.

The General Banking Act of 1871, before referred to, by sec. 19, enables stock to be transferred at the chief place of business of the bank, or at any of its branches which the Directors shall appoint for that purpose; and it provides for sales of stock under execution similar to the provisions before mentioned.

WILSON, J., delivered the judgment of the Court.

We are of opinion that the assessment made by an assessor is not void because he did not make and complete his roll by or before the first of May, although the words of the Act are "*not later than* the first day of May in cities and towns."

If the non-return of a single roll in the municipality were to avoid the whole rating for the year, it would be placing an enormous and an unnecessary degree of power

in the hands of any unscrupulous officer; and it would defeat not only the purposes of the Legislature, which manifestly requires that there should be, without any kind of fail, an assessment made; but it would be very injurious to the municipality; it would prejudice the security of creditors, and it would embarrass and operate unjustly with respect to the other purposes for which an assessment roll is required,—as the voting at Parliamentary and Legislative elections, and upon by-laws for various objects.

The enactment is sufficiently complied with by holding that the language is imperative as to the assessor,—so that the fulfilment of his duty will not save him from the penalty he has incurred by his delay; but that the time fixed is not final as regards the municipality or the public, but directory only.

The argument of the plaintiff would admit of no excuse for the delay—the destruction of the roll by fire, the death of the assessor, or any other act beyond his control; and we are glad to say the Courts have dealt differently with cases of the kind, even when the exact merits were more positive than the one in question.

If there had been any force in the objection, it might have been answered successfully in this case as against the plaintiff, for he, at all events, accepted the roll as binding upon him, by appealing from it, first to the Court of Revision and secondly to the Judge of the County Court, and by payment of part of his taxes and refusing to pay the remainder for a cause and upon a ground quite inconsistent with the maintenance of such an objection.

We are also of opinion that there is no room for argument that bank stock was not personal property for assessment purposes under the 32 Vic. ch. 36, sec. 4, O. It was personal property, and is so expressly by that enactment.

We are also of opinion that as bank stock was exempt, not absolutely but qualifiedly, only “so long as there is a special tax on bank issues,”—that whenever there was no longer a special tax on bank issues, it became as personal property liable to be assessed, and was no longer within the

protection of the exemption. The exemption with the qualification was first introduced by the 16 Vic. ch. 182, sec. 6, sub-sec. 12, and it did not in words apply to the dividends on such stock.

That enactment continued until the 32 Vic., ch. 36, sec. 9, sub-sec. 16, O, which expressly excluded the dividends on such stock from the exemption which was given to the stock.

The Dominion Act, 34 Vic., ch. 5, sec. 15, exempted all banks within the scope of that Act from the tax then imposed on the average amount of its notes in circulation.

The duty was on the average amount by which the bank notes returned as in circulation had exceeded the average amount of the gold and silver coin, and bullion and debentures receivable in deposit for registered notes, which the bank had on hand during the some period: Consol. Stat. C., ch. 21, sec. 3. The Dominion Act, 33 Vic., ch. 11, sec. 5, applied to the same subject; and ultimately the 34 Vic., ch. 5, was passed.

The effect of it was to exempt banks from the tax on their notes in issue. When that was done, the exemption of bank stock under the Assessment Act was determined.

So far, there can be no doubt. The principal question is, whether this stock, being held by the plaintiff, who was at the time of his assessment, and still is, a resident in the City of Kingston, can be assessed, when the Merchants' Bank, in which such stock is held, has the chief place or seat of its business in Montreal?

That bank has, both by the 31 Vic., ch. 84, sec. 6, and by the 34 Vic., ch. 5, sec. 4, power to retain, open and establish branches or offices of discount and deposit, and transact business at any place or places in the Dominion.

The stock is transferable at the chief place of business: 31 Vic., ch. 84, sec. 19; 34 Vic., ch. 5, sec. 19; and by the last section it may be transferred at any of the branches which the directors shall appoint for that purpose.

It was, therefore, argued for the defendants, that as it was transferable at any of the bank's branches in any part

of the Dominion, if the directors chose so to authorize,—that it was personalty in this Province.

Also, that being personalty in fact, as well as by the positive enactments of the statutes,—and personalty according to the general law being supposed to be, and to be governed by the laws of the domicile of the owner of it,—it was assessable where the owner resided, in like manner as his other personalty which he had in his immediate personal enjoyment.

And it was further contended that, as by the Consol. Stat. C., ch. 70; 31 Vic., ch. 84, sec. 19, D; and 34 Vic., ch. 5, sec. 19, D, bank stock can be seized and sold by the sheriff under execution, that such stock could be taken wherever it could be transferred; and so it was seizable in this Province.

The plaintiff opposed these arguments, and he relied strongly upon the eighteenth exemption under the 32 Vict., ch. 36, sec. 9, O, which applies to “all property, real or personal, which is owned out of this Province.”

It is not shewn on the pleadings that the Merchants' Bank have any branch, agency or office, or that they transact any business in this Province.

Nor is it shewn that the directors of the bank, if there be any branch, agency, or office here, have appointed that the stock of the bank shall be transferable at any of them.

And although it was argued that the sheriff could seize and sell the bank stock of a resident of this Province which he held in a bank in Quebec, the statutes which were referred to for the purpose by no means bear out that argument.

The main contention and the broad argument relied upon chiefly was, that this stock being personalty, and although it was in fact situated in Montreal, yet it had existence and effect in this Province, and was property, by operation of law, in and governed by the law here, because the owner of it had his domicile here.

The general principle, that personal property follows the person, and is governed by the law of domicile of the owner, was not disputed.

But it was said the generality of that rule could not, and did not, prevail with respect to this stock under the assessment law.

And certainly the rule may be admitted, and yet the assessment may be bad, because the statute does expressly make a distinction between real and personal property which is owned in the Province, from that which is owned out of the Province.

What the defendant has therefore to make out is not the general rule, which need not be questioned, but that this bank stock is not property which is owned out of this Province.

The eighteenth exemption is of "all property, real or personal, which is owned out of this Province."

It may be said it was useless to exempt *real* property, for it could not be described on the assessor's roll, nor could it be distrained upon, nor sold. Perhaps it was unnecessary to exempt it, because we could not possibly legislate with respect to it.

It may have been done *ex abundanti*; or it may have been done so as not to include any kind of machinery or other things affixed to land, which our Assessment Act declares shall be considered as land, but which might be held, where they were situate, not to be land, or it might be doubtful which they were; or it may have been to exclude shares in some kind of works or corporations which have been expressly made real estate, where the corporation was.

But it was not useless to declare that personal property which is owned out of the Province should be exempt, because that may have been done for the very purpose of preventing property which had no existence here from being taxed by reason of the assumption or fiction that it followed the person for all purposes, against the actual fact of its foreign locality.

In *Moreton v. Milne*, 6 Binney R. 351, Tilghman, C. J., said, at p. 361: "The proposition (that personal property has no locality) is true in general, but not to its utmost extent,

nor without several exceptions. In one sense personal property has locality, that is to say, if tangible it has a place in which it is situated, and if invisible, (consisting of debts), it may be said to be in the place where the debtor resides." See also *Story's Conflict of Laws*, 7th ed., sec. 383, notes.

So some stocks are transferable only according to the *lex rei sitæ* : *Ibid* and 3 *Burge's Colonial Law*, 749, 750.

So in Louisiana it has been determined that as by the laws of that State a delivery is necessary to pass personal property, a transfer made by the owner of it in conformity to the laws of his foreign domicile is invalid : *Story's Conflict of Laws*, 7th ed., sec. 386.

By the English law, bankruptcy of the owner of personal property situate in a foreign country will pass the title to that property just as a voluntary transfer of it by the owner of it would have done.

We cannot but think that this stock held in a bank in Montreal is personal property which is owned out of this Province. It is property which is there in point of fact; it must be assigned according to certain forms by 31 Vic., ch. 84, sec. 19, D, and by 34 Vic., ch. 5, sec. 19, D; and "it shall not be valid unless it be made and registered in a book to be kept by the directors for that purpose."

A general maxim, such as "*mobilis sequuntur personam*," may be a good general guide; but it is certain it cannot be depended on to its full extent when a statute says that personal property owned out of this Province shall not be taxed.

We have nothing to do, then, with the general law, but with the particular provision.

And in our opinion the plaintiff's stock is owned by him, so far as the Assessment Act is concerned, at the head or chief place of business of the bank in Montreal. The fact that it may be transferred at a branch office of the company, if the directors so appoint, is a provision made for the convenience of the shareholders, and does not change the locality of the stock itself.

The enactment that all questions respecting the transmission, &c., of stock shall be settled by one of the Superior Courts where the head office of the bank is, is also of some consequence upon this point, as shewing that the locality which the bank has is, in this instance, in Quebec, and not in this Province: 31 Vic., ch. 84, sec. 35, D; 34 Vic., ch. 5, sec. 25.

I should doubt very much that the sheriff could seize and sell this stock merely because it may, if the directors choose, be made transferable at a branch office: Consol. Stat. C., ch. 70, sec. 4.

We think this stock was not assessable here, because it was owned out of the Province.

But if it were even doubtful, the decision should be for the plaintiff, because whoever claims the right to impose a burden on the subject must establish clearly that there is such a right.

This particular bank property is stated as severable from the rest of the personal property by the pleadings, and so the defendant may have a good justification for the residue, although he may fail as to a part. We hold on these facts the assessor had no jurisdiction to assess the bank stock, nor the Court of Revision to affirm it, nor the Judge of the County Court to confirm the decision of the Court: that nothing shewn in the pleadings has cured, or can cure, the radical defect of want of jurisdiction.

The defendant is entitled to judgment against the demurrers to the second and third replications, and also against so much of the demurrers to the fifth, sixth, seventh, and eighth replications as apply to the second and third pleas of the plaintiff.

And the plaintiff is entitled to judgment on the demurrers to the fourth replication, and to so much of the fifth, sixth, seventh, and eighth replications, as apply to the fourth and fifth pleas; and also against the demurrer of the defendants to the rejoinder to the fourth replication.

The defendant is entitled to judgment on the exceptions taken to the first part of the second plea.

We hold the fourth plea has been made good by the rejoinder to the fourth replication, alleging that the head office of the Merchants' Bank is situate out of Ontario, and that the stock was personal property owned out of Ontario; so that the fourth plea with the rejoinder are equivalent to the fifth plea; and that they shew a good answer to the cognizance.

I feel there is reason to complain of the mass of pleadings here. It cannot help the parties, and cannot in any way be required when the law of amendment is so liberal and so largely exercised. It tends only to confusion and to an increase of the labour of the Court. (a)

Judgment accordingly.

(a) This case has been argued and stands for judgment in the Court of Error and Appeal.

Since this judgment was given Mr. Justice Wilson has handed the Reporter the following note:—

“The case of *Tupper v. The Treasurer of the Hospital of St. Peter Port*, 3 Knapp 406, shews that this bank stock is not to be considered as situate in the Province, and that it would not be unreasonable to tax the person in respect of it although it is beyond the Province. There a tax on the person in Guernsey was upheld, which was made in respect of investments made in England.”

MITCHELL ET AL V. THE GREAT WESTERN RAILWAY CO.

G. W. R.—Award for land taken—Right to withdraw after award—4 Wm. IV. c. 29, s. 4—Construction of—Action on award—Denial of plaintiff's title to the land—Purchase of land for gravel pit.

Sec. 4 of 4 Wm. IV. ch. 29, defendants' act of incorporation, provides that money awarded to be paid by them for lands taken shall be paid within three months from the award, and in case the company shall fail to pay the same within that period their right to assume the property shall wholly cease; "and it shall be lawful for the proprietor to resume his occupation of such property, and to possess fully his rights and privileges in respect thereof free from any claim or interference from the said company."

The plaintiffs sued defendants for money awarded to be paid to the plaintiffs, as executors and trustees of one A, for land taken by defendants for the purposes of their railway.

Defendants pleaded 1. That they had never taken possession of or used the land, and that forthwith after publication of the award they gave notice to the plaintiffs that they had abandoned all intention of doing so, and withdrew from the purchase. *Held*, bad on demurrer, for that defendants under the enactment above stated, and the subsequent Statutes affecting them, could not after award made withdraw from the purchase. In a second plea, after stating the same facts, defendants added that the plaintiffs then resumed their occupation of the land, and had ever since such notice occupied the same free from any claim or interference by defendants. *Held*, a good plea; for that if the notice was given before the three months allowed for payment by sec. 4 above referred to, the plaintiffs might accept it and elect to treat the contract as ended; and if after, the plaintiffs had taken advantage, as they might do, of the right which was given by the Statute for their benefit.

The third plea was that the plaintiffs had no title to the land either at the time of the arbitration and award or at the commencement of the suit. *Held*, a good defence.

Quære, whether a title acquired after the award, but before suit, would enable them to recover.

Semble, that a purchase of land for a gravel pit under 18 Vic. ch. 176, sec. 20, is to be governed by the same proceedings as purchases of other lands by the company. See judgment in note *a*, p. 159.

DECLARATION. First Count: that the plaintiffs and the defendants entered into an arbitration to ascertain, in manner provided by the statutes in that behalf, the amount of compensation to be paid to the plaintiffs as executors and trustees of one Lewis Anguish, for a part of lot one in the eighth concession of the township of Rainham, in the County of Haldimand, (describing it,) which lands the defendants required for their railway, and purposes connected therewith: that one John Kerr was appointed

by defendants as arbitrator, pursuant to the statutes in that behalf, and that the plaintiffs appointed one Jose W. Holmes : that the said arbitrators at their first meeting could not agree upon a third arbitrator, whereupon the Judge of the County Court of the County of Haldimand, on the application of defendants, after due notice in that behalf given to the plaintiffs, duly appointed one Abisha Morse to be the third arbitrator respecting the premises. And that the said three arbitrators having taken upon themselves the burthen of the said arbitration, &c., the said Jose W. Holmes and the said Abisha Morse, being a majority of the arbitrators, afterwards, on the 29th day of November, 1872, awarded and determined of and concerning the said lands, and made their award in writing, signed with their hands and sealed with their seals, that the said defendants should pay to the plaintiffs, as such executors and trustees as aforesaid, they being the persons by force of the statutes in that behalf entitled to receive the same, the sum of \$9,000. And the plaintiffs aver that, although the period of three months has expired since the making and publishing of the said award before the commencement of this suit, and all things were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiffs, as such executors and trustees as aforesaid, to be paid the said sum of \$9,000, yet, the defendants have wholly neglected and refused and still neglect and refuse to pay the same to the plaintiffs as such executors and trustees as aforesaid, &c.

Second count : for money awarded by J. W. H. and A. M. to be paid by defendants to the plaintiffs as such executors and trustees as aforesaid by an award of the said J. W. H. and A. M. under a reference made, under the provisions of the Railway Acts by which defendants are incorporated, to them, respecting the value of the lands in the first count above mentioned, and for interest upon money due by the defendants to the plaintiffs as such executors and trustees, and forborne at interest to the defendants at their request, and for the costs of the said award, &c., and

for money found to be due on accounts stated between plaintiffs as such executors and trustees and defendants.

Fifth plea, to first count: that the said lands for which the said sum of \$9,000 is alleged in the said count to have been awarded, were never taken possession of or in any way used by the defendants, and that forthwith after the making and publication of the said award, to wit, on the 3rd day of December, 1872, the defendants, by notice duly served upon the plaintiffs, did declare and give notice to the plaintiffs that the defendants would not assume possession of the said lands, and that all intention of occupying the same or any part thereof was abandoned by the defendants, and that the defendants disclaimed any interest in the said award, and that nothing would be done to affect the interests and rights of the plaintiffs or of the devisees of the said Lewis Anguish, deceased, in the said lands, and that the defendants then abandoned and withdrew from the purchase and all claim or interest to or in the said lands.

Sixth plea, to the first count: that the said lands, for which the said sum of \$9,000 is alleged in the said first count to have been awarded, were never taken possession of or occupied, or in any way used by the defendants, and that forthwith after the making and publication of the said award, to wit, on the 3rd of December, 1872, by notice duly served upon the plaintiffs, the defendants did declare and give notice to the plaintiffs that the defendants would not assume possession of the said lands, and that all intention of occupying the same or any part thereof was abandoned by the said defendants, and that the defendants disclaimed any interest in the said award, and that nothing would be done to affect the interests and rights of the plaintiffs or of the devisees of the said Lewis Anguish, deceased, in the said lands, and that the defendants then abandoned and withdrew from the purchase of and all claim or interest to or in the said lands; and the plaintiffs then resumed their occupation of the said lands, and have ever since the giving of the

said notice used and occupied the said lands, and have possessed fully their rights and privileges in respect thereof free from any claim or interference from the defendants.

Eighth plea, to the second count, that the said lands and the alleged award and reference therein mentioned are the same lands and the same award and reference in the first count mentioned, and the money claimed under the said alleged award in the said second count mentioned, and alleged causes of action in respect thereof, are one and the same as in the first count mentioned. And the defendants further say, that the said lands were never taken possession of, &c., (as in the fifth plea to the first count.)

Ninth plea, to second count, after alleging the identity of the cause of action with that in the first count, the same as the sixth plea to the first count.

Tenth plea, to first and second counts: that in and by the said award in the said counts mentioned the said sum of \$9,000 is awarded to be paid to the respective person or persons entitled to receive the same, and is assessed and declared to be the full value of the fee simple of the said land. And the defendants say that the plaintiffs were not, at the time of the said arbitration and award in the declaration mentioned or at the commencement of this suit, either as such trustees and executors or otherwise, the owners or occupiers of the said land or any part thereof, or entitled to the fee simple thereof; and the said plaintiffs at the time aforesaid had not a good title to the said lands or any part thereof, or any right or power to sell or convey the same to the defendants, and were not the persons entitled to receive the said sum of \$9,000 or the value of the said land.

Demurrer to the fifth and sixth pleas, on the grounds, that the defendants are not empowered, either by the common law or by any statute, to recede from, revoke, annul, desist from, or get rid of the award in said first count mentioned, after the making thereof, by a notice of desistment, or by any other notice, or in any other way or manner, or by any device whatever: that it appears from said pleas that said notice was not given until after the making

and publication of said award: that said pleas are insufficient, in not disclosing that a new notice was given by the defendants to the plaintiffs with regard to the lands in question herein, or with regard to other lands to be taken by them in lieu thereof.

Demurrer to the eighth and ninth pleas to the second count, on the like grounds.

Demurrer to the tenth plea to the first and second counts: that the said plea strives to raise an immaterial issue, as to whether the plaintiffs were at the time of the arbitration and award in the declaration mentioned or at the commencement of this suit, the owners or occupiers of the said land, or entitled to the fee simple thereof, whereas the title of the said Lewis Anguish is all that is material, the plaintiffs only having and assuming to have a statutory right to arbitrate with the defendants, to convey the said lands and to receive the moneys awarded, in the capacity of trustees and executors of said Lewis Anguish; and the residue of said plea is a traverse of a mere legal deduction as to whether the plaintiffs are by law, under the facts stated, entitled to said moneys.

Joinder.

John Martin for the plaintiffs. The facts of the case were before the Court not long since on a special case between the same parties. The judgment of the Court, although ready to be delivered and made known to the parties, was not formally given (*a*). That action has been discontinued, and the title which the Court before thought was defective has since then been perfected by the widow of the testator, who is tenant for life under the will, having conveyed her interest in the land to the defendants.

Robinson, Q. C., contra. It is not intended again to argue the question whether the company had the power to withdraw from the award, after the argument in the former action and the opinion of the Court which was expressed upon it. It has been raised upon this record in the event

(*a*) See this judgment, note on p. 159.

of the case going to appeal. As to the title to the land, the executors of the testator do not represent the widow of the testator. The Court did not on the former argument express any positive opinion whether, if the title were made perfect by acts or conveyances subsequent to the award, the company could be made to take the same or not.

The tenth plea must be a good defence, because it traverses not only that the plaintiffs had a title at the time of the award, but that they had a title at the commencement of this suit. It is important, however, that the parties should have it settled whether the plaintiffs can, since the award was made, acquire a perfect title and make the company take the land, though they had not a perfect title when the award was made. *Johnson v. Ontario, Simcoe, and Huron R. W. Co.*, 11 U. C. R. 246, was referred to.

As to the sixth and ninth pleas, they allege a fact not before the Court on the special case, respecting the right of the company to withdraw or desist from the arbitration or award: namely, that since such notice of withdrawal and desistment the plaintiffs have resumed possession of the land, and have ever since then used and occupied it, and have possessed fully their rights and privileges in respect thereof, free from any claim or interference from the defendants. This new fact has a material bearing on the case, because it shews an assent by the plaintiffs to accept of the notice of withdrawal or desistment as binding upon the defendants, and as conferring a right upon the plaintiffs which they have chosen to take the benefit of.

Martin, in reply. The 9 Vic., ch. 81, sec. 30, shews that the parties interested in the land may contract for the sale of it after the line has been laid out by the company.

WILSON, J., delivered the judgment of the Court.

I have referred to the judgment which was prepared by myself on the argument of the special case (*a*), and I remain

(*a*) See this judgment in note, on p. 159.

of the same opinion, for the reasons there given, which I need not repeat, that the defendants had not the right by notice, or otherwise, without the leave of the Court, which was not applied for, to withdraw or desist from their notice to treat or claim for the purchase of the land in question.

I am of opinion, therefore, that the fifth and sixth pleas are not sufficient in law.

As to the sixth and ninth pleas, which allege not only that the defendants gave such notice, &c., but that the plaintiffs then resumed their occupation of the land, and have ever since the giving of the notice used and occupied it, and have possessed fully their rights and privileges in respect thereof, free from any claim or interference from the defendants, they will have to be considered as they are affected by that special averment.

The 4 Wm. IV., ch. 29, sec. 4, enacts that the compensation awarded shall be paid within three months by the company, and if the company do not do so that their right to assume any such property, "in respect of which such sum of money was awarded, shall wholly cease; and it shall be lawful for the proprietor to resume his occupation of such property, and to possess fully his rights and privileges in respect thereof free from any claim or interference from the said company."

I do not see why full effect should not be given to this enactment, which was made for the benefit of the land owner, whenever he chooses to take the benefit of it by the assumption of his land and the re-possession of all his rights and privileges free from any claim or interference from the company.

It is a power which is placed in the hands of the land owner to be used if he elect to abandon the compensation awarded, or which he may use, and the knowledge or fear of such power being used may operate compulsorily on the company and quicken the payment of the sum awarded.

It is right, too, that the land-owner should know promptly, and have it in his power to determine, whether the land is to remain his, or whether the compensation is

to stand instead of the land, under the 16 Vic., ch. 99, sec. 7.

The defendants have not very accurately placed their defence in this respect upon the statute. If they had done so they would have alleged that they did not pay the sum awarded for the land within three months from the time of the same being awarded, and that by reason of their default their right to assume the land wholly ceased, and that the plaintiffs, according to the statute in that behalf, resumed their occupation of the property, &c.

In place of doing so, they say that after the making of the award they gave notice to the plaintiffs that they would not assume possession of the land, &c., and that the plaintiffs then resumed the occupation of the land, &c.

The first count of the declaration states "that, although the period of three months has expired since the making of the award before the commencement of the suit, and all conditions," &c., yet the defendants have not paid the money, which certainly shews the three months had expired before the suit was brought, but it does not shew the three months had expired before the plaintiffs resumed their occupation, and that it was in consequence of the defendants' default that they did resume.

It appears that the plaintiffs resumed their occupation because the defendants gave notice of their withdrawal from the award, and of their determination not to assume the land; and that notice may have been the day after the making of the award, as may also the plaintiffs' resumption of their occupation, and so not properly within the statute at all.

If, however, the defendants did, before the expiration of the three months, expressly disclaim going on with the award, and give notice that they abandoned all right to assume the land, I do not see why in equity at any rate the defendants may not conclude themselves from afterwards setting up a title under the award, and from disturbing the plaintiffs in the occupation of the land which they had resumed by the defendants' act and procurement.

If the notice were given before the expiration of the

three months then it was before default, and a plea of rescission is a good defence at law: *Goss v. Lord Nugent*, 5 B. & Ad. 58, 65; *King v. Gillett*, 7 M. & W. 55; *Cort v. The Ambergate, Nottingham and Boston & Eastern Junction R. W. Co.*, 20 L. J. Q. B. 460.

So, also, is the discharge of performance by one of the parties an authority to or excuse for the other party treating the contract as broken or ended: *Hochster v. DeLa Tour*, 2 E. & B. 678, 689; *The Danube & Black Sea R. W. & Kustendjie Harbour Co. (Limited) v. Xenos*, 11 C. B. N. S. 152, S. C. in Ex. Ch. 13 C. B. N. S. 825; *Frost v. Knight*, L. R. 5 Ex. 322.

If the notice were given *after* the expiration of the three months the case is literally within the provision of the Act.

If it were given *before* that time, the cases referred to shew that the plaintiffs might accept it as a breach of the contract, and the plaintiffs might elect then to treat it as ended. In either view the defendants must be entitled to the benefit of the plaintiffs' assumption of the land, if it were an act done with the intent and for the purpose of excluding the defendants from assuming the land or taking any advantage under the award: *Moore v. Campbell*, 10 Ex. 323; *Carter v. Dean of Ely*, 7 Sim. 211.

The sixth and ninth pleas must be either informal pleas of rescission, setting out rather the evidence of such an act than the averment of it; or they must be informal pleas of estoppel, treating the plaintiffs as concluded from enforcing performance of the award after they had elected to resume possession of the land in lieu of it upon the defendants' default to pay the money in time; or they must be informal pleas under the statute of a default by the defendants to pay in three months, and a resumption of the land by the plaintiffs in consequence—that default being either after a three months' failure to pay, or, what has been treated as equivalent to it, after a notice from the defendants before the expiry of the three months that they had repudiated the award and would not perform it, although the notice does not expressly say the defendants would not pay the money.

In substance the pleas show a good ground of defence, and by the 36 Vic., ch. 8, sec. 8, judgment must be given upon them as the equitable rights of the parties respectively require. I do not, by any means, say that the defendants would not, independently of that statute, have been equally entitled to judgment in their favour, on the pleas as they stand. I think they would have been and are.

The remaining question is upon the demurrer to the tenth plea.

The judgment which was ready to be given upon the special case on the same question now raised by the tenth plea, was that the defendants were, in an action on the award, at liberty to enquire into the plaintiffs' title to the land: that the arbitrators had nothing to do with determining where the title was or how it was actually placed. Their duty was only to assess the compensation to be paid to the party for the land on the assumption that he had the title which it was asserted he had—an estate for years, long or short, as the case might be; an estate for life, good or bad, as the life might be; or whatever else the estate might be. There were several cases referred to at the time.

The plea, then, which alleges that the plaintiffs were not as trustees or executors, or otherwise, the owners or occupiers of the land, or entitled to the fee simple, must be a good defence.

The 16 Vic., ch. 99, sec. 7, also shews the mere fact of an award made in the plaintiffs' favour does not entitle them to demand payment of the money.

We were requested on the argument to say whether the defendants could be made to accept a title to the land acquired by the plaintiffs after the making of the award, or whether the plaintiffs must have the title at the time of the making of the award to enable them to demand payment of the compensation.

It was said the outstanding life estate of the widow, which it was considered shewed a defective title in the plaintiffs on the former argument, had been since conveyed to

the plaintiffs or to the defendants, or tendered to the defendants, and that they had refused to take it, and so the title had since the making of the award been made perfect.

It was intimated on that argument that whatever was a matter of conveyance, or even defect of title, might probably be such an act which could be remedied at any time.

The case may or may not have required any expression of opinion upon the point. The demurrer certainly does not, and it will be better not to bind ourselves to an opinion when the question has not been argued before us.

I may say the 16 Vic., ch. 99, sec. 7, does not dispense with the necessity of a proper conveyance and warranty, if the company require it, being made to the company before the money can be demanded.

The award may, under circumstances, be deemed the title of the company. If the award be the title, and if the award, with whomsoever the reference may have been entered into—a perfect stranger to the title perhaps—is to be binding upon the owner of the land, and to be good against the world so far as the title of the company to the land is concerned, then the company has acquired a perfect statutory title by the mere operation of their notice to treat and of the award, subject to its being avoided, as before mentioned, by their non-payment of the money and the claimants resuming possession of the land.

And any defect of title in the persons who were treated with for the land can be of no consequence, and so the acquisition of a title subsequent to the making of the persons treated with can be of no effect, so far as title is concerned, although it must have some effect as to conferring a right to demand the compensation money.

In this case the company has neither paid the money to any one, nor into Court.

In *McLean v. The Great Western R. W. Co.*, 32 U. C. R. 198, we thought after award made, and the money paid, although to a wrong person, the true owner could not dispossess the company of the land, but must make his claim for compensation under the statute.

These thoughts on the point are merely thrown out because something was said on the subject, as before stated, and we desire rather to guard ourselves from being supposed to have decided anything at that time, or at the present, further than that the persons who are entitled to demand the money must be persons who have the title for which the compensation was awarded, and in lieu of which title the money is to stand. And the plaintiffs, by their demurrer to the tenth plea, admit they had no title either at the making of the award or at the commencement of the suit, and so they are not entitled to the money.

We know nothing on this record of their having acquired a title subsequent to the arbitration. If they have, they can join issue on the tenth plea, and the question will then be presented, as we dare say it will be yet at a further stage, for argument and decision.

The judgment will be for the plaintiffs on the demurrers to the fifth and eighth pleas, and for the defendants against the demurrers to the sixth, ninth and tenth pleas.

Judgment accordingly. (a)

(a) A previous action was brought upon the award, in which the facts were stated for the opinion of the Court without any pleadings.

It was stated that the defendants had offered to pay the plaintiffs the expenses attendant upon the arbitration, which the plaintiffs refused to accept, insisting upon payment also of the \$9000 awarded. And that the testator Lewis Anguish died on the 17th August, 1867, having by his will devised the land in question to his wife during her life or widowhood, and in case of her death or second marriage he directed the executors to sell it. The widow was still living unmarried, and was no party to the arbitration.

The special case was argued in Easter Term, 1873, by *John Martin* for the plaintiffs, and by *Robinson*, Q. C., for defendants. The statutes and authorities cited are referred to in the following judgment, which was prepared and made known to the parties concerned, but not formally delivered, the plaintiffs being allowed to discontinue and bring another action.

WILSON, J.—It is not of any consequence to consider what the effect of a notice given by the company to take land compulsorily under the statute is—whether to create the relation of vendor and purchaser, and if so, to what extent and for what purpose—because more than a notice has passed between the parties.

There has been a nomination of arbitrators, under the statute, to fix the value of the land; an application to the Judge of the County Court to nominate a third arbitrator; and an award made by the majority of the arbitrators fixing the price to be paid for the land.

A mere notice does not in equity constitute a conversion of the realty into personalty, and does not create the full relation of vendor and purchaser; for a bill for specific performance will not lie for or against the land owner or company, to compel the completion of the contract: *Haynes v. Haynes*, 30 L. J. Ch. 578, S. C. 1 Dr. & Sm. 426, 7 Jur. N. S. 595; *Re Arnold*, 9 Jur. N. S. 883.

After such notice, neither the owner nor the company can retract or get rid of the obligation: *ibid*.

And if, after such notice, the owner attempts to sell the land, he will be restrained by injunction: *The Metropolitan R. W. Co. v. Woodhouse*, 11 Jur. N. S. 296.

But a notice and the subsequent fixing the amount of the price and compensation by arbitration, together constitute a contract for sale and purchase which the Court will enforce at the suit of the vendors: *Mason v. Stokes Bay Pier and R. W. Co.*, 32 L. J. Ch. 110.

After a notice given, the company may be compelled by mandamus to proceed and perfect the contract their notice has created: *Rex v. The Hungerford Market Co.*, 4 B. & Ad. 327; *Morgan v. The Metropolitan R. W. Co.*, L. R. 4 C. P. 97. See also *Marquis of Salisbury v. The Great Northern R. W. Co.*, 17 Q. B. 840.

The company, after the award made for the price, cannot be sued for the money until a conveyance has been executed to them: *The Guardians of the East London Union v. The Metropolitan R. W. Co.*, L. R. 4 Ex. 309.

And in an action on the award, the company may deny the plaintiff's title: *Read v. The Victoria Station and Public R. W. Co.*, 1 H. & C. 826; *Mortimer v. The South Wales R. W. Co.*, 1 E. & E. 375; *Horrocks v. The Metropolitan R. W. Co.*, 4 B. & S. 315; *Regina v. The Cambrian R. W. Co.*, L. R. 4 Q. B. 320.

The conveyance may be unnecessary by the terms of the statute: *Bruce v. Willis*, 11 A. & E. 463; *Badger v. The South Yorkshire R. W. and River Dun Co.*, 1 E. & E. 347.

The principal question here is, whether, after all the preliminaries for a reference have been taken, and an award made, the defendants can withdraw their notice, and from the proceedings taken upon it, and abandon the land, and relieve themselves from the award? or, in the words of Consol. Stat. C., ch. 66, sec. 11, sub-sec. 16, whether the notice for lands may be desisted from by the defendants? That provision is:—"Any such notice for lands, as aforesaid, may be desisted from, and new notice given with regard to the same or other lands, to the same or any other party, but in any such case, the liability to the party first notified for all damages or costs by him incurred in consequence of such first notice and desistment, shall subsist.

Under this clause it has been held that the notice can be desisted from after the arbitrators had been appointed and had been duly sworn, and had held a meeting and adjourned to some future day: *Grimshawe v. The Grand Trunk R. W. Co.*, 15 U. C. R. 224. And also that the notice given cannot be desisted from until a new notice is given by the company: *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

The notice in this case was not given until after the award was made and published to the defendants, and so it differs from both the preceding cases in that respect. The notice, too, was not accompanied with a "new notice with regard to the same or other lands, to the same or any other party;" nor is it shewn that any such new notice was or has been given, and which, according to the case last cited, would leave the old notice still in full effect.

I do not say whether I concur in that decision or not. It is not necessary.

The notice is not in terms desisted from. The defendants inform the plaintiffs:—1st. That they (the defendants) will not assume possession of the land. 2nd. That all intention of occupying any part thereof is abandoned. 3rd. That the company disclaim any interest in any award made

or purported to be made. 4th. And that nothing will be done to affect the interests and rights of the executors or devisees of the land.

But all that seems to leave the notice untouched, and the company may do all that they say in their notice, and yet they may mean to pay the sum awarded; they may disclaim all interest in the award, but they may feel they cannot avoid the obligation imposed upon them by it. They do not say, in express terms, they will not pay the money awarded or to be awarded, or that they disclaim all liability for or in respect of it. The notice, too, is given in the matter of the arbitration.

If the notice be not desisted from, the owners of the land are kept in an embarrassing position: unless the money awarded be paid to them, they do not know whether they can safely occupy or improve it as their own, or dispose of it by sale, or let it.

I make no question the defendants did intend to abandon their notice, when they abandoned all benefit by it or under it; and I shall consider it at present as if formally desisted from, in order to determine whether the defendants can exercise the powers of this special provision of the Act.

The defendants are not affected by any of the provisions of ch. 66 of the Consol. Stat. C., "between the second and the one hundred and twenty-fifth sections, both inclusive;" 35 Vic. ch. 65, sec. 5., D.

Reference must therefore be made to the defendants' own special acts for the means of determining this claim; and under their special acts—the 4 Wm. IV., ch. 29, and the 16 Vic., ch. 99, being both referred to—

Mr. Justice Draper said, in the *Great Western R. W. Co. v. Miller*, 12 U. C. R. at p. 660, "If the price of the land were ascertained, it may be that, by withholding payment, and abandoning the land, the company could not be compelled to take it and pay the ascertained price. * * It may be, however, on the other hand, that the price being ascertained, they will be compelled to complete the purchase."

In *Baby v. The Great Western R. W. Co.*, 13 U. C. R. 291, Robinson, C. J., at p. 293, said, "Nor is there any provision to prevent them from relinquishing land which they may at one time have shewn an intention to acquire, but which they may afterwards find not to be necessary to be held by them permanently."

And at p. 294, "If the company had given some unequivocal evidence of their desiring at one time to purchase this property, I do not yet see that they could be obliged to persevere in that intention, and could not change their mind, however strong and reasonable might be the motive. Indeed, the provisions in the Acts seem inconsistent with such a position, for after the company has, in the plainest manner, claimed to take for permanent use any tract of land, and after the value has been ascertained by arbitration, the only consequence of their not paying that value seems to be that the owner may resume possession of the land. That, at least, is what the statute provides."

The other Judges express no positive opinion.

In this last case the company had not given notice; they had merely occupied the land temporarily as they alleged, and for which occupation they were willing to pay. The owner desired to compel the company to pay, by mandamus to arbitrate and to take the land permanently. The application was discharged.

In *Miller v. The Great Western R. W. Co.*, 13 U. C. R. 582, Robinson, C. J., said, at p. 592, "I purposely refrain from expressing any opinion as to the right of the company, after any award has been made, to relinquish possession of the land which has been valued, and to claim exemption in consequence from a compliance with the award."

So far nothing has been decided on this point in our own Courts.

By the 4 Wm. IV. ch. 29, sec. 3, the company have power to contract for land "upon which they may determine to construct the said railroad, either by purchase, * * * or for the damages in consequence of the road being

constructed in and upon * * the lands * *," and in case of disagreement as to the value or damage to arbitrate, the arbitrators to be sworn, the award to be subject to be set aside by the Court, as in ordinary cases of submission. At that time all submissions to arbitration were revocable.

By the 7 Wm. IV., ch. 3, sec. 29, the submission was not allowed to be revoked when made by a Rule of Court or Judge's order, or order of Nisi Prius, or when there was a clause in the submission that it might be made a Rule of Court, unless with the leave of the Court or of a Judge.

The C. L. P. Act of 19 Vic., ch. 43, sec. 97, contained in the Consol, Stat. U C., ch. 22, sec. 176, enables all submissions made by consent by deed and in writing to be made a Rule of Court, unless they contain words purporting that they should not be made a Rule of Court.

The present C. L. P. Act, sec. 179 prevents submissions being revoked without the leave of the Court or a Judge, unless in cases where the submission contains words purporting that the parties intended it should not be made a Rule of Court.

I assume there is a submission in writing here. The notice of the company is the submission on their part; that of the plaintiffs was by the nomination of their nominee, which I take to have been by writing, in a case where the parties were proceeding with so much formality.

Since the passing of the C. L. P. Act, no such submission, I think, can be revoked without the leave of the Court or a Judge.

Sec. 3 of the Act of 1834 is not the one under which this award, or awards affecting the defendants generally are made. The nomination of arbitrators by the parties is under that section.

If the land owner do not appoint, then the Judge of the County Court appoints, under the 9 Vic., ch. 81, sec. 26; or if the parties do not agree on the appointment of a third arbitrator, the Judge appoints him under the 16 Vic. ch. 99, sec. 8.

The award under the 9 Vic., ch. 81, sec. 26, is to determine the amount of money which the company shall pay to the respective persons entitled to receive the same for the land or damages. The decision of the majority of the arbitrators is final, and the amount so awarded the company is to pay to the several parties entitled to receive the same when demanded. And the arbitrators are to make up and sign a record of the award or arbitration, which shall be deposited in the registry office of the county in which the land lies.

The 16 Vic., ch. 99, secs. 5, 6, and 7, contains provisions respecting tender of money, taking possession of land, and payment of the money into court, which are not material here, further than the award is to be deemed the title of the company to the land, and the money awarded is to "stand in the stead of such land; and any claim to or incumbrance upon the said land, or any portion thereof, shall, as against the company, be converted into a claim to the compensation, or to a like proportion thereof."

The fourth section of the Act of 1834 is the one which is alone or chiefly relied upon for the purpose of establishing the right of desistment. That section provides that the compensation which may be awarded "shall be paid within three months from the time of the same being awarded; and in case the company shall fail to pay the same within that period, then their right to assume any such property, or commit any act in respect of which such sum of money was awarded, shall wholly cease, and it shall be lawful for the proprietor to resume his occupation of such property, and to possess fully his rights and privileges in respect thereof free from any claim or interference from the said company."

Does that mean more than it shall cease at the *election of the owner* or person entitled to compensation,—that is, of the person who is not in default? Does it give to the company who are in default the power and right of making that default the means of getting rid of the liability they had incurred by the award? I think it does not.

The power of desistment exercisable under the General Railway Act, is a large and unusual privilege. It has not yet been held to apply after an award has been made. If exercisable only before award, then it would be given at a time when there was no default on the part of the company. But here the default of the company is that which is to constitute purposely the act of desistment in favour of the defaulting party.

The Act should not be so construed. Consistently with the later legislation, I think it cannot be so construed. It would be useless to enact,—that the company should pay the sum awarded to the person entitled to it when demanded: 9 Vic., ch. 81, sec. 26; and that a record of the award or arbitration shall be made and signed by the arbitrators, and deposited in the registry office of the county where the land lies: *Ibid*; and that the sum awarded shall stand in the stead of the land, and claims and encumbrances on the land be converted, as against the company, into claims to the compensation; and that the award shall, in the case of there being no conveyance, be deemed to be the title of the company to the land: 16 Vic., ch. 99, sec. 7,—if the company may, by their own wilful act and default, invalidate the award, and the record of it made in the registry office. This would give them, too, the power in effect to revoke the submission, contrary to the general enactment on the subject, by their own act, without the leave of the Court or a Judge.

The general rule is, that the notice given, requiring or taking land, such as was here given, is irrevocable. It may, however, by the express enactment, be revoked, but not by this company, which is not within the operation of that provision. The award alters the rights of parties; it constitutes a conversion of the realty into personalty; and it would greatly embarrass the owner or his heirs, devisees, or creditors, if their rights or property could be bandied about from realty to personalty by the award, and from personalty to realty by the wilful and designed default of the company for three months to pay the sum awarded, or even by a desistment under the general Act, if they were within it.

I am of opinion there are grave reasons why this power of evading and invalidating an award, and of revoking a submission, and of causing difficulty and confusion in the proprietary rights of others, and even in their own, should not be given inferentially to this company; and that they had not, and have not, the right or the power to revoke their notice,—if they had formally done so,—nor the submission nor award.

As to the other point which was argued. The executors under this will do not represent the widow of the testator.

Under the 9 Vic., ch. 81, sec. 30, she has an estate in her own right as devisee for life, contingent upon her marrying again. The company can have no right to take possession until they have made a tender or given a notice to the different owners and claimants, and have properly dealt with them if known, or, if not known, until they have proceeded under 9 Vic., ch. 81, sec. 26. Because they have dealt with the executors can be no reason why Mrs. Anguish, the devisee for life, should be bound.

The award professes to be made under the section of the Act last mentioned; but that section applies:—1st, to persons whose residence may not be in the Province; or, 2nd, not known to the company; or, 3rd, when the title is in dispute; or, 4th, when the owner or owners is or are unwilling or unable to treat for the sale; or, 5th, to appoint arbitrators.

And these cases or persons are not applicable, so far as the widow is concerned: *Inge v. The Birmingham, Wolverhampton, and Stowe Valley R. W. Co.*, 3 DeG. M. & G. 658.

The owner is one having a good title, and not merely one in possession, and the company must deal specially under their Jury clauses in such a case: *Douglas v. North Western R. W. Co.*, 3 N. & J. 173; S. C., 3 Jur. N. S. 181.

The company here have dealt with the reversioners instead of the tenant

for life. She should have co-operated with them. The award is in pursuance of the notice of the company, which was to appoint an arbitrator to award "the respective sums which the company shall pay to the respective persons entitled to receive the same for the said land. The award has done that, and has declared the sum to be the full value of the fee simple of the said land, and no doubt the company must get a good title before they can be compelled to pay, as the authorities already referred to shew.

If a conveyance were made to them by all persons who had the right and title to convey, it may be that the award might be enforced: *Nelthorpe v. Holgate*, 1 Coll. 203; but as no such conveyance has been made or tendered the defendants have not now a legal title by the award alone, because the tenant for life is not a party to it; and she could have been, for she was known, and in the Province, and probably willing as she was able to treat and to arbitrate.

The executors are not the owners or occupiers or proprietors, nor do they represent the tenant for life. They have not bound her and cannot bind her by their reference.

The award, therefore, has not given a title to the company. That is all that is decided at present.

I do not think the fact that the notice given referred to land for a gravel pit, under the 18 Vic. ch. 176, sec. 20, can make any difference in the legal effect of the case. If a purchaser under that section is to be considered as a purchaser in ordinary cases, and the clause as merely an empowering enactment, then there can be no pretence for making a desistment, although the company might perhaps be able to contend they had not entered into any binding contract for the purchase of the land; and in such a case the award would certainly be no title, and there would be the greater necessity for a formal conveyance being made and tendered to the company, executed by all persons having title to or interest in the land.

It is very probable that a purchase under that clause may be held to be carried out and to be governed by the like proceedings which relate to the other purchases of land for the roadway and stations of the company.

For the reasons given, I think the plaintiff cannot compel the defendants in this action to pay the sum of \$9,000 awarded.

RUTTAN ET AL. V. SMITH.

Ejectment—Statute of Limitations—Payment of rent—Acknowledgment of title.

The plaintiffs claimed title through A. R., one of the children and devisees of J. C. The defendant claimed through A. R. and the other devisees of J. C., and by length of possession. J. C. died in 1843, having, by his will made in 1841, devised this land to his children in fee.

A. R. died in 1851. Neither she nor any one on her behalf had had any possession since 1848.

It was proved that in 1848 one F., who was then on the lot, and through whom defendant claimed, told one M. that he had A. R.'s share of the lot, and was to pay the rent to C., the solicitor for the plaintiffs in a Chancery suit brought by F., and by A. R. and other plaintiffs, for partition of J. C.'s property, on account of the costs of that suit; and that he afterwards told the eldest son of A. R., in 1850, who went to him for rent, that he kept it back to pay the costs. It also appeared that F. had paid money about 1857 to the town agent of C. in that suit on account of the costs. It was sworn, however, that F. occupied under a brother of A. R., whose right he had purchased, not under A. R., and no lease was proved from A. R., nor any authority from her for the payment to C.

Held, Wilson, J., dissenting, not sufficient evidence of payment of rent to A. R. to take the case out of the statute.

The defendant, in a bond to F., dated in 1856, recited that he, defendant, had bought in the estate of all the owners of this lot, except the estate of the family of F., and of such other of the claimants as were under disability, which class would include the plaintiffs—which defendant was to get in; and an agreement in writing was made between F. and another and the defendant, in 1855, by which defendant agreed to buy in all the interest of the children of the late J. C. in this lot.

Held, not an acknowledgement under the statute, not being given to the plaintiffs or their agent.

The construction of J. C.'s will as declared in *Read v. Smith*, 16 Grant 55, concurred in and followed.

EJECTMENT to recover lot 6, in the first concession of the Township of Thurlow.

The defendant claimed part of the lands which were mentioned as being certain town lots in the town of Belleville, &c., laid out in the plans of town lots on said lot 6 by one John Emerson, Provincial Land Surveyor, which plans are registered in the proper registry office.

The plaintiffs claimed title to the land as heirs of Richard N. Ruttan, deceased, who claimed by title through Aulay Ruttan, one of the devisees of John Caniff deceased.

The defendant, besides denying the title of the plaintiffs, asserted title in himself:—

1. Under conveyances from the heirs, devisees and grantees of Elizabeth Nugent, Mary Miller, Phoebe Foster, Daniel

Caniff, Joseph Caniff and Aulay Ruttan, the devisees of John Caniff, deceased.

2. By length of possession in the defendant and those under whom he claims.

The cause was tried before Galt, J., at the Assizes at Belleville, in the fall of 1872, with a jury.

By consent the copies of the will of John Caniff and Aulay Ruttan were admitted, and the execution of these wills was also admitted.

Aulay Ruttan's will was registered on the 30th June, 1850.

It was proved that John Caniff died on the 21st of February, 1843. His wife survived him, and died in February, 1846.

Mrs. Aulay Ruttan, the daughter of John Caniff, lived in Adolphustown. Her husband was dead when John Caniff died. She died on the 11th of May 1851.

The children of Mrs. Ruttan, who survived Mr. Ruttan, were Peter, John, William, David, Richard, Charles, Bathsheba, and Mary.

Richard married Elizabeth Griffin, aged 31, in 1853, and left three children, Sarah Jane, Andrew Austen, and Enoch George, and died two or three years after his mother.

Mrs. Caniff, the widow of John, lived on the premises until her death.

Between 1846 and 1851 David Ruttan, Mary Miller, and Shubal Foster occupied lot 6.

Mary Miller left the house on the property twenty years ago, from March, 1872. Foster was working the place under her. David Ruttan left about 1848.

William R. Miller said at the trial, that from the time his mother Mary Miller went on the place, (1846,) he was in the habit of visiting her, and going on the farm until five or six years ago; he always found Shubal Foster there. Richard never lived there.

Elizabeth Ruttan, widow of Richard Ruttan, said, Mrs. Foster, the wife of Shubal Foster, was the sister of Mrs. Aulay Ruttan; she wished the latter to come and live with her on the homestead, as the witness said, to hold possession

of the property, but Mrs. Ruttan declined. She sent her son David to live there. The witness said that she was not aware that Foster paid any rent to Mrs. Ruttan, or that he was her tenant.

William R. Miller, the first witness, on being re-called said ; Shubal Foster was dead. In 1848 he went to the lot to see his mother. He saw Foster, who told him that he had Aulay Ruttan's share of lot 6 leased, and was to pay the rent to Coleman, to pay the costs of carrying on a suit in Chancery to get a division. Shubal Foster continued on the place until his death.

Peter Ruttan, the eldest son of Mrs. Aulay Ruttan, who had sold his right to the defendant,—(there was the following entry in this evidence : “ this action is brought to recover Richard's share,”) stated, that he was sent by his mother some nine or ten months before her death, he thought in 1850, to Foster to receive rent. Foster said when he applied to him he did not intend to pay rent, because he kept it back to pay the costs on the Chancery suit for the division of the property. The rent was to be paid to Mr. Coleman ; he did not say whether he had paid it or not. Foster was in possession of the property. He never went to claim rent after his mother's death.

Charles Coleman stated, he was employed by Foster and others to bring a suit in Chancery for a division of Mr. Caniff's property ; Mrs. Ruttan was one of the plaintiffs. Mr. Foster paid him money. He told him he was to pay his rent on account of the costs. Mr. Macara was his agent in Toronto. Mr. Foster paid him \$200 or \$300. He never told him it was rent. He gave his note to Macara for his bill in 1856 or 1857. He had not paid him anything since 1857. Mr Foster retained him. His retainer was signed by all the plaintiffs, including Mrs. Aulay Ruttan and Mrs. Miller. He looked to Foster for his pay. He thought some of the money was paid before Mrs. Ruttan's death. He got Mr. Foster to settle Macara's bill to relieve him. He did not know whether it was rent or not.

David Foster, the son of Shubal, stated, amongst other things, that David Ruttan was there representing his

mother; he did not remain over a year. He and his father bought out David's right to get rid of him, and he and his father occupied under the right acquired from David. They did not occupy the premises by the permission of Mrs. Ruttan. He added, "I daresay we occupied it contrary to her wishes." After David left in 1848 no person but his father and his family worked the farm or received the profits. They paid no rent to any person. His father gave Macara a horse and buggy on account of the costs.

W. A. Foster, another son of Shubal, proved the death of his father two years ago. He, witness, 'was living in the house and searched his papers. He found no lease, and never saw any. He had known the place since he was nine years old; he was then thirty-five. His father and family worked the place up to the time of the partition between his father and the defendant, on the 22nd of August 1856. Since that time the defendant had been in possession. David Ruttan was on the place about a year when his mother was alive, and after that that no person but "*ourselves*" had anything to do with the place.

The copy of the will of Aulay Ruttan was put in. It purported to have been made on the 16th of March 1851, and it was registered on the 30th of June, 1851.

Amongst other things, by the will she devised as follows: "Thirdly, I give and bequeath unto all my surviving children an equal proportion of all the real estate willed to me by my father John Caniff, or otherwise that which may fall to me from my father's estate."

An Indenture dated the 22nd of August, 1856, was also put in. It purported to be between Shubal Foster and Phoebe his wife, Joseph Foster, Henry Ostrom and Elizabeth Harriet Ostrom his wife, John C. Foster, James Foster, Benjamin Foster, Daniel Foster, Matilda Ann Foster, spinster, and Theodore Foster, of the first part; Albert Lewis Smith, Esq., of the second part; and Mary Foster wife of the said Benjamin Foster, Lydia Ann Foster, wife of the said Joseph Foster, Elizabeth L. Foster, wife of the said John C. Foster, Hannah Foster, wife of the said James Foster, and Sarah Jane Foster, wife of the said

Daniel Foster, of the third part; and *witnessed* that the parties of the first part, in consideration of £250, bargained, sold, released, conveyed, and confirmed unto the party of the second part, his heirs and assigns, lot 6, and the broken front in front thereof, in the first concession of the Township of Thurlow, consisting in all of 230 acres, more or less, excepting thereout such part of said lot as had been sold by John Caniff during his lifetime, to hold to said Albert Lewis Smith, his heirs and assigns, unto his and their own use for ever. The parties of the third part each released their claim for dower.

The execution by Phoebe Foster and Elizabeth Harriett Ostrom of the deed was certified by two justices.

A bond was put in from the defendant to Shubal Foster dated the 23rd September, 1856, in the penal sum of £3,000. It contained a recital to the effect that the defendant had purchased and bought in the estate of all the owners of lot 6, and in the broken front in front thereof, in the first concession of Thurlow, excepting the estate of the family of said Foster, and of such other of the claimants thereto who were under some disability to convey, which latter claimants said Smith had agreed to get and buy in upon the removal of said disabilities. And the said Foster and Smith had agreed upon a partition of said lands, and had prepared deeds each to the other for execution, by which Foster became the owner of forty and a half acres thereof, as sole owner thereof, particularly described in the said deed; and the said Smith had agreed to buy in the claims and estate of such persons as were under the said disabilities, and thereupon to confirm the title of the said Shubal Foster.

Then the condition of the obligation was, that if the defendant should as soon as the disabilities were removed, and upon each being removed, buy in the claim and estate of such person, and should thereupon convey the same, so far as the same should extend to the said hereditaments and appurtenances, to the said Shubal Foster in fee simple, the bond should be void, or else to remain in full force.

The plaintiffs' counsel put in an agreement between Foster, Ostrom, and the defendant, dated the 14th December 1855, whereby the defendant agreed to purchase in all the right, title, and interest of the children of the late John Caniff, and of their children, of in and to the lands in question, and upon acquiring these rights to convey forty-one and a half acres to the Foster family.

The defendant's counsel objected to the admissibility of the document.

David Foster, a witness, and a party to the agreement, was asked, "who were the persons meant by the expression, children of the late John Caniff and their representatives?"

The question was objected to, but was allowed, and the witness answered: "We intended that amongst others the rights of the children of Richard Ruttan, (the plaintiff,) should be acquired by Mr. Smith, the defendant, under this agreement. At the time the agreement was signed Richard Ruttan's children were very young." *David Foster* further stated, "We have since divided with Smith. Smith got possession from us. We gave him a conveyance.

The mother of the plaintiffs on being re-called said that defendant had called on her, and offered her \$10 to sign a paper concerning the Caniff estate. She thought it was in 1853. He said when the children were old enough, he would give them a call. He did not ask her to convey the children's interest. He told her that he did not think that she had any interest, but if she would sign the paper he would give her \$10.

The defendants' counsel moved for a nonsuit, on the ground that the evidence shewed that neither of the plaintiffs, nor any one through whom they claimed, had been in possession for over twenty years.

It was agreed between the counsel that the jury should be discharged, and that defendant's counsel should file: 1. The deed from David Ruttan to Robert Reid, or a copy. 2. The deed from Foster to Smith. And that the Court should direct a verdict for the party who in their opinion

was entitled to succeed on the whole case; the Court to draw inferences; the plaintiffs to move to enter a verdict. The learned Judge entered a verdict for the defendant.

In Michaelmas Term, 1873, *Wallbridge*, Q. C., obtained a rule *nisi* to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs, on the ground that they had established a clear legal title under John Caniff, who died seised.

That the defendant failed to establish a conveyance under the devisees of the said John Caniff, and offered no evidence of a conveyance from the heirs, devisees, or grantees of Aulay Ruttan, as set up by him, the said Aulay Ruttan being the ancestor of the plaintiffs, and one of the devisees of the said John Caniff.

The payment of rent by Shubal Foster to the use of the said Aulay Ruttan, was proved to have been made within twenty years of the commencement of the suit, and defendant acknowledged the title of the plaintiffs by his bond to Shubal Foster on the 23rd September, 1856.

J. Bell, Q. C., (of Belleville,) shewed cause. The will of John Caniff, under whom the plaintiffs claimed, was discussed, in the case of *Perrin v. Caniff*, in the Court of Chancery about 1865, but not reported, and in the Court of Appeal, in the case of *Read v. Smith*, 16 Grant 52. The rule in *Shelley's* case governs the construction of the will, and shews that Aulay Ruttan held her share of her father's estate after the death of her mother in fee simple. Under that she was entitled to one fourth, and one fifth of one fourth of Mrs. Nugent's share, that being divided amongst two brothers and three sisters.

John Caniff died in 1856. Mrs. Nugent died in February, 1844; old Mrs. Caniff on the 21st of February, 1846; and Aulay Ruttan on the 11th of May 1851. The possession was shewn in Foster, and those claiming under him, for more than twenty years. The costs that were said to have been paid by Foster to Mr. Coleman was no payment of rent within the Real Property Act, Consol. Stat. U. C. ch.

82, sec. 15. This amount was said to have been paid in 1856 or 1857. The writ in this cause was issued on the 4th of January, 1872. Foster claimed the land as his own, the payment he made was his own debt, he had given his note for it. There was no evidence of a lease, and no payment of rent as rent after 1848 or 1849. There may have been rent paid up to the time David left.

The condition of the bond given by Smith to Foster is no evidence to cut off the claim of the defendant under the statute. Consol. Stat. U. C., ch. 82, sec. 15, refers to the acknowledgment of the title of the person entitled as having been "given to him or to his agent, in writing, signed by the person in possession." See *Forsyth v. Bristowe*, 8 Ex. 716, 720; *Doe Curzon v. Edmonds*, 6 M. & W. 295; *Morrell v. Frith*, 3 M. & W. 402; *Ley v. Peter*, 3 H. & N. 101; *Richardson v. Younge*, L. R. 10 Eq. 275, L. R. 6 Ch. App. 478; *Fursden v. Clogg*, 10 M. & W. 572; *Hodsden v. Harridge*, 2 Wms. Saund. 196.

Peter Ruttan speaks of the payment of rent. The Act changing the law of descents came into force in 1852. Peter Ruttan was the heir at law of Aulay, and he conveyed to Dougall, and that title came to the defendant. If Aulay took a fee simple, Peter was her heir at law. He did not prove Aulay's will, and the will itself does not pass the real estate.

Wallbridge, Q. C., contra. The real question is the Statute of Limitations. Aulay, under her father's will, took an estate tail, and after her death the children took distributively as tenants in tail. Foster's possession was only then good as against the life estate of the mother.

The defendant claims to have purchased the rights of all the other heirs of Aulay.

On the death of old Mrs. Caniff all the daughters lived on the farm together. It does not appear that Mrs. Ruttan ever left the place at all, except with the intention of returning. Her son David did return. The time he left is not shewn; they bought him out, Smith purchased the right of Mrs. Ruttan's heirs, except those of Richard's children. In

the partition suit referred to by Mr. Coleman all signed the retainer. Could not Foster then deny that he was co-tenant with them?

The amount paid by Foster towards the costs of these proceedings must be considered as paid as rent. Foster was then in privity of estate with Mrs. Ruttan. *McIntyre v. Canada Co.*, 18 Grant 367, shews that a written acknowledgment of title made to the trustee of the real owner, would take the case out of the statute. The bond dated the 14th December, 1855, between Foster, Ostrom, and Smith, the defendant, and the instrument dated the 23rd September 1856, between the Fosters and the defendant Smith, being both between Foster and defendant, the defendant should be considered as bound, for Foster was in possession of the place in privity with Aulay Ruttan, and her heirs.

The case stood over for the purpose of having the will of the late John Caniff, which was not produced on the argument.

John Caniff's will when produced was found to be dated the 6th of April, 1841, and under it he devised, amongst other things, to his four daughters, Phoebe Foster, Mary Miller, Aulay Ruttan, and Elizabeth Nugent, share and share alike the lands in question, with other lands, for and during the period of their natural lives and no longer; and that after the decease of the said daughters their share of his said estate and premises should descend in equal shares to their heirs in fee simple, for the use of them their heirs and assigns forever, subject, however, to a devise of an estate for life, theretofore made in favor of his wife on the said lot 6; and in case of the death of any of his said children without issue, that their share of his real estate should be equally divided amongst the survivors, to have, &c., during their natural lives and no longer, which he willed and devised should descend in equal shares to their heirs and assigns forever.

There were some other provisions in the will which it might be necessary to consider, if those already referred to

were not sufficient to show that under the will the four daughters of John Caniff took an estate in fee.

RICHARDS, C. J.—In *Miller v. Smith*, 23 C. P. 51, the learned Chief Justice of that Court in giving judgment said: “On the argument I understood it to be not denied by the counsel that the Court of Chancery had pronounced on the will of John Caniff that his children took an estate in fee. We have had a difficulty in finding the decision, but have no reason to doubt that such existed.” The reporter adds in a note, “There is such a decision, but it is not reported.”

In *Read v. Smith*, in Appeal, 16 Grant 55, Mowat, V. C., said: “Previous to the 19th November, 1855, the appellant Smith had purchased, and he then owned under the devisees, certain interests in the said lot. Levisconte had purchased from the eldest son of Aulay Ruttan all his interest. The parties are not agreed as to what interest her eldest son had, and the point was not argued on the appeal. It seems to me at present that each of the daughters took an estate in fee simple, with an executory devise over in case she should die without issue, leaving one or more of the testator's other children surviving her: *Ex parte Hooper*, 1 Dr. 264; *Greenwood v. Verdon*, 1 K. & J. 74; 2 *Jarm. on Wills*, 3rd ed., 487; *Dale v. McGuinn*, 15 Grant 101. One of the daughters, Elizabeth Nugent, did die without issue, and her share thereupon went to her three surviving sisters and two brothers, say one-fifth of her one-fourth, (or five-twentieths,) that is, one-twentieth of the whole estate to each, making the share of each of the survivors six twentieths. Afterwards, another daughter, Aulay Ruttan, died a widow, devising her interest to her seven children equally—each of whom would under this devise have one seventh of her six twentieths, equal to six one hundred and fortieths, or three seventieths of the whole estate. The interest of her eldest son which Levisconte had got was therefore three-twentieths. This is the portion which the Chancellor assumed, or held, to belong to

Levisconte, and which the respondents insisted in their reasons of appeal to be the extent of his interest, The late Vice Chancellor Esten, in a suit to which Smith was not a party, is said to have construed the will in the same way, but I have not been able to find the case. On the argument of this appeal, nothing, I think, was urged in support of a different construction."

If the daughters of John Caniff only took an estate for life with remainder to their heirs in fee, then the plaintiff cannot maintain this action, for Peter Ruttan was the heir at law of Aulay Ruttan when John Caniff died, and also when his mother died in 1851; the law authorizing all children to inherit not coming into force until 1852.

It will be difficult, out of the words cited from the will, to shew by any rule of construction that an estate tail was created. The very words are that the heirs are to take "in fee simple for the use of them their heirs and assigns forever." None of the usual words creating an estate tail, such as "heirs of the body" "heirs male" or "heirs female," are used, not even such words as "issue" or "children," from which, with other circumstances, it might be inferred that an estate tail was intended. The most favorable view for the plaintiff is to hold that Aulay Ruttan took an estate in fee under her father's will.

As to the possession and payment of rent. Miller, the first witness, said that in 1848 he went to the lot and saw Foster, who told him he had Aulay Ruttan's share of lot 6 leased, and was to pay the rent to Coleman, to pay the costs of carrying on a suit in Chancery, to get a division. Peter Ruttan, the eldest son of Aulay, said he was sent by his mother some nine or ten months before her death, he thinks in 1850, to Foster to receive rent; Foster said he did not intend to pay rent, because he kept it back to pay the costs in the Chancery suit for the division of the property. The rent was to be paid to Mr. Coleman; he did not say whether he had paid it or not. Foster was in possession of the property. He never went to claim rent after his mother's death.

Mr. Coleman said he was employed by Foster and others to bring a suit in Chancery for a division of Mr. Caniff's property, Mrs. Ruttan was one of the plaintiffs. Mr. Foster paid him money. He, Foster, told him he was to pay his rent on account of the costs. Mr. Macara was his, Coleman's, agent in Toronto. Mr. Foster paid him \$200 or \$300. He never told him it was rent. He gave his note to Macara for his bill in 1856 or 1857. Foster had not paid him anything since 1857. Mr. Foster retained him. His retainer was signed by all the plaintiffs, including Mrs. Aulay Ruttan. He looked to Foster for his pay. He thought some of the money was paid before Mrs. Ruttan's death. He got Foster to settle Macara's bill so as to release him. He did not know whether it was rent or not.

David Foster, the son of Shubal, stated, amongst other things, that David Ruttan was there representing his mother; he did not remain over a year, *The witness and his father bought out David's right to get rid of him, and he and his father occupied under the right acquired from David. They did not occupy the premises by the permission of Mrs. Ruttan.* He added, "I dare say we occupied it *contrary to her wishes.*" After David left, in 1848, no person but his father (Shubal Foster) and his family worked the farm, or received the profits *They paid no rent to any person.* His father gave Macara a horse and waggon on account of his costs.

W. A. Foster, another son of Shubal, proved the death of his father two years before, (1870,) and that he, the witness, was living in the house, searched his papers, found no lease, and never saw any. He knew the place since he was nine years old, (1848,) he was then thirty-five. His father had formerly worked the place up to the time of the partition between his father and the defendant, viz.: the 22nd of August, 1856. Since that time the defendant had been in possession. David Ruttan was on the place about a year, and after that no person but "*ourselves*" had any thing to do with the place.

I think that the evidence is not sufficient to shew that Shubal Foster paid rent to Mrs. Ruttan, or any one

claiming under her. The statement of Miller that in 1848 Foster told him that he had leased Aulay Ruttan's share, and was to pay the rent to Coleman to pay the costs in a Chancery suit for partition, and of Peter Ruttan, that Foster in 1850, refused to pay rent, because he kept it back to pay the costs in the Chancery suit, do not shew that there was any payment of rent.

They state it was to be paid to Mr. Coleman, and Mr. Coleman said Foster told him he was to pay his rent on account of the costs. Mr. Coleman said no costs were paid him by Foster after 1851; that he held Foster responsible for the costs, and that Foster settled with Mr. Coleman's agent, Macara, and released him from his charges. This was about 1856 or 1857, he could not say whether it was rent or not. Foster never told him it was rent.

It is not shewn or pretended that Mrs. Ruttan, or any of her children or devisees, ever recognized or authorized the payment of rent to Coleman.

David Foster and W. A. Foster, sons of Shubal, who were called as witnesses by the plaintiffs, in their evidence deny any tenancy or payment of rent, and shew a complete and uninterrupted occupation for more than twenty years, beginning before the death of Mrs. Ruttan.

There is no doubt as to the fact that no one was in actual possession on behalf of Aulay Ruttan, after David left, in 1848.

If the payment of rent is to be considered as shewing the right to bring the action, then when was that rent paid?

I do not think the evidence satisfactorily shews the payment of rent so as to establish the plaintiffs' right on that ground.

The statement of David Foster was that his father had bought out David Ruttan, (who was then representing his mother,) to get rid of him: that he and his father occupied under the right acquired from David: that they did not occupy by the permission of Mrs. Ruttan, but he considered contrary to her wishes; and after David left no person but Shubal Foster and his family worked the farm, or received

the profits, and they paid no rent to any person. The evidence of W. A. Foster is confirmatory of this view.

David Foster seems to have known all the circumstances relative to his father's occupation of the place, and it is not suggested he has now any motive for favoring the defendant. He is called by the plaintiffs; his view of the matter, that they paid no rent to anyone after David Ruttan left, seems more reliable than that presented by the other witnesses, that the payment of the costs of the partition suit, which he was bound to pay at all events, and which there is no evidence whatever that Mrs. Ruttan ever authorized him to pay on her account, or on account of the use of her share of the premises, was made on account of rent. And this alleged payment was made too after they had bought out the right of David Ruttan to get rid of him.

There is no evidence of express agreement to pay rent, and there is no evidence of express payment of money *qua* rent, or for use and occupation. I think, therefore, that the plaintiffs' case fails on this ground.

The next ground is that under the Consol. Stat. U. C. ch. 88 sec. 15, which is similar to Imp. Stat. 3 & 4 Wm. IV. ch. 27, sec. 14, the defendant had acknowledged the title of the plaintiffs.

The evidence of such acknowledgment was in the recitals in the bond from the defendant to Shubal Foster, dated the 23rd September, 1856, to the effect that the defendant had bought in the estate of all the owners of lot 6, excepting the estate of the family of Foster, and of such other of the claimants thereto who were under some disability to convey, which latter claimants defendant had agreed to get and buy in, upon the removal of said disabilities, and confirm the title of Foster.

It is urged that here is a distinct admission under the hand and seal of the defendant of existing claims of parties thereto who were under disabilities, and his agreement to get and buy in their claims, and that plaintiffs are such parties, and therefore this admission is sufficient.

A further agreement was put in between Shubal Foster,

Ostrom, and the defendant, dated the 14th of December, 1855, whereby the defendant agreed to purchase in all the right, title, and interest of the children of the late John Caniff, and their children, in the lands in question, and on acquiring these rights to convey forty-one and a half acres to the Foster family. David Foster was asked the persons meant by the expression children of the late John Caniff and their representatives, and he said it was intended, amongst others, that the rights of the plaintiffs should be acquired by Smith. They were at that time very young.

The acknowledgement under the section of the act referred to, must have been given to the "*person* entitled to the land or to *his agent*, in writing, signed by the person in possession."

Now this acknowledgment was not given to the plaintiffs, or their agent, nor indeed in any way for their benefit, but was given in a matter which alone concerned the parties to the bond, and their agreement and their interest.

Under similar provisions in the Imperial Statute, 3 & 4 Wm. IV. ch. 27, sec. 40, where the acknowledgment is to be signed by the party liable to pay the money, or his agent, and is to be given to the person entitled thereto, (i.e., to the money) or his agent, in *Forsyth v. Bristowe*, 8 Ex. 721, Parke, B., said, "It may be a question whether this section applies to any but the remedies against the realty, and therefore whether it extends to actions on covenant to pay mortgage money, or bonds to secure the payment of it. If it does, the general provision of the 3 & 4 Wm. IV. ch. 42, sec. 5 is not inconsistent with this provision, and the law would be, that if an action of covenant or debt be brought on a mortgage deed, or debt on a mortgage bond, and the plaintiff seeks to take the case out of the operation of the statute by an acknowledgment in writing signed by the party liable or his agent, it must be made to the person entitled to the money or his agent; but if it be an ordinary covenant to pay money, or on a bond, an acknowledgment made by the party liable or his agent, though not made to the party entitled or his agent, would be sufficient."

In that case it was not necessary to decide on these grounds, as the interest on the mortgage debt had been paid within the twenty years.

In *Goode v. Job*, 28 L. J. Q. B. 1, 32 L. T. 88, in answer to a bill in equity, the defendant admitted holding under an agreement to grant a lease, and that was within twenty years of the bringing of the action. The answers were in writing, in reply to questions at the instance of the plaintiff, and were signed by the defendant. The Court held that a sufficient written acknowledgement given to the plaintiff, by the defendant, within the meaning of sec. 14 of the Statute 3 & 4 Wm. IV. ch. 27.

Wightman, J., said, as reported in 32 L. T. 88, "What the statute required was, that the acknowledgment should be given not to some third party, but to the party interested himself."

We think that this is the correct view of the statute, and it seems to be adopted by *Lord St. Leonards* in his work on the Real Property Statutes, 2nd ed., 67, 68 & 69, and notes. See also *Darby & Bosanquet* on Limitations, 292.

On the whole, we think that the plaintiffs have failed to make out a case, and the rule to enter a verdict for them must be discharged.

MORRISON, J., concurred.

WILSON, J.—The facts—that Shubal Foster said to William R. Miller he had leased the share of Mrs. Aulay Ruttan, and he was to pay the rent to Coleman to pay the costs of carrying on the partition suit, and the fact that he refused to pay the money to Peter Ruttan, the eldest son of Aulay Ruttan, when he went at his mother's request to get rent from Foster, not because he did not owe rent, nor because he was not to pay it, but because he kept it back, that is, kept the rent back, to pay the costs of the partition suit, and that he was to pay it to Coleman; and the fact that he told Mr. Coleman, the gentleman who was carrying on the partition suit, that he was to pay his rent on

account of the costs, and the fact that he did pay Mr. Coleman's Toronto agent, who was conducting the suit, \$200 or \$300, and gave his note for the balance of the costs, —establish the fact that Aulay Ruttan and those claiming under her had an interest in the property; that Shubal Foster was occupying it for or under her, and was to pay rent for it, and did pay rent as late as 1855 or 1856.

According to *Doe dem. Spencer v. Beckett*, 4 Q. B. 601, and particularly the case of *Doe dem. Newman v. Godsill*, *ibid.*, in the note (b) on p. 604, also reported in 5 Jur. 170, these matters were all evidence of a tenancy and of a payment of rent by Shubal Foster as Aulay Ruttan's tenant, and the tenant of those claiming under her.

I think the plaintiffs are entitled to recover for their share, because their title has not been barred by the statute.

Rule discharged.

O'DONNELL V. TIERNAN.

Patent—Description of land.

Held, under the facts and evidence set out in this case, that the plaintiff, claiming under a patent for part of lot 29 in concession A “according to a plan of survey by Provincial land surveyor J. L. P. O’Hanly, dated on the 9th January, 1860, of record in the Crown Lands Department,” was confined to and governed by the plan mentioned, and could not claim according to the legal limits of the lot by the original survey.

EJECTMENT for part of lot 29, in concession A, Rideau Front, and part of lot 29, in concession B, Rideau Front, according to a plan of survey by J. L. P. O’Hanly, P. L. S., dated the 9th January, 1860, of record in the Crown Lands Department, containing $77\frac{4}{10}$ acres, more or less, as described in the grant thereof from the Crown to one Archibald Keys, dated 29th January, 1862.

The defendant defended for part of the lands specially described, which, in a special defence, she said the plaintiff “insists are included in and form part of the lands men-

tioned in the writ, but which the defendant claims are not included in and do not form part of the said lands."

The plaintiff claimed, through several mesne conveyances, under the patent from Archibald Keys above mentioned, and the defendant under a patent to Ann Tiernan, dated 12th of September, 1861.

The patent to Archibald Keys, dated the 29th of July, 1862, under which, by certain mesne conveyances, the plaintiff claimed, granted to him as follows: "part of lot 29, in concession A, and part of lot 29, in concession B, according to a plan of survey by P. L. surveyor, J. L. P. O'Hanly, dated the 9th of January, 1860, of record in the Crown Lands department, that is to say: Commencing at the intersection of the easterly limit of the old Ottawa road, by the limit between lots numbers twenty-eight and twenty-nine, in concession B; thence north sixty degrees, two minutes, eighteen seconds, east, astronomically, seven chains, fifty links, more or less, to the water's edge of the river Rideau; thence northerly, following the said water's edge, to the limit between lots numbers twenty-nine and thirty, in the said concession B; thence south sixty-degrees, two minutes, eighteen seconds, west, astronomically, six chains, forty links, more or less, to the eastern limit of the allowance for road between the said concessions A and B; thence south twenty-two degrees, fifty-nine minutes, east, following the last mentioned limit, four chains, eighty links, more or less, to the lands heretofore granted by the Crown to Ann Tiernan, in the said lot number twenty-nine, in concession B; thence north sixty degrees, two minutes, eighteen seconds, east, astronomically, three chains, thirty links, more or less, to the aforesaid easterly limit of the old Ottawa road; thence south nineteen degrees, twenty-two minutes, thirty-six seconds, east along the said easterly limit of the said old road sixteen chains, seventy links, more or less, to the place of beginning; reserving that portion of the old Ottawa road which falls within the above described area, and free access to the shore of the river Rideau for all vessels, boats and persons. Also, com-

mencing in the westerly limit of the allowance for road between the said concessions A and B, at the north-east angle of lot number twenty-nine. in concession A; thence south sixty degrees, two minutes, eighteen seconds, west astronomically forty-five chains, more or less, to the lands heretofore granted by the Crown to Joseph M. O. Cromwell, in the said lot number twenty-nine, in concession A; thence southerly, following the eastern limit of the lands so granted, twenty chains, more or less, to the northern limit of the road known as Cromwell's road allowance; thence north sixty degrees, two minutes, eighteen seconds, east, astronomically, following the said northerly limit of the said road allowance, seven chains, twenty links, more or less, to the lands heretofore granted by the Crown to Ann Tiernan, in the said lot number twenty-nine, in concession A; thence north twenty-nine degrees, fifty-seven minutes, forty-two seconds, west, astronomically, nine chains; thence north sixty degrees, two minutes, eighteen seconds, east, astronomically, thirty-six chains, twenty-two links; thence south twenty-nine degrees, fifty-seven minutes, forty-two seconds, east, astronomically, five chains; thence north sixty degrees, two minutes, eighteen seconds, east, astronomically, two chains, ninety-eight links, more or less, to the aforesaid westerly limit of the allowance for road between the said concessions A and B; thence northerly, following the last mentioned limit, sixteen chains, more or less, to the place of beginning."

The cause was tried at Ottawa, at the Fall Assizes of 1873, before Richards, C. J.

The learned Chief Justice was of opinion, under the evidence, which is sufficiently stated in the judgment, that the description in the plaintiff's patent was governed by O'Hanly's plan.

A nonsuit was entered, with leave to the plaintiff to move to enter a verdict for him.

In Michaelmas Term last, *Harrison*, Q. C., obtained a rule calling on the defendant to shew cause why the non-

suit should not be set aside, for misdirection of the learned Chief Justice, in ruling that the plaintiff was bound by O'Hanly's map, and could not shew that the land granted to the widow Tiernan is south of the line shewn as its northern boundary on the said plan ; whereas the plaintiff should have been allowed to shew the real situation of the land granted to the widow Tiernan, in accordance with Sparks's survey establishing the boundary between lots 29 and 30, and to claim the northern boundary of the land granted to the widow Tiernan as the southern boundary of the land granted to Archibald Keys adjacent thereto.

In this term *MacLennan*, Q. C., shewed cause. The plaintiff desires to force the defendant further south than where her present occupation is, by reason of the late survey made by Mr. Sparks,

The defendant claims under a patent dated the 12th of September, 1861. The plaintiff claims under a patent dated the 29th of July, 1862. The last patent grants the land to Archibald Keys, from whom the plaintiff claims, "according to a plan of survey by Provincial Land Surveyor J. L. P. O'Hanly, dated the 9th of January, 1860, of record in the Crown Lands Department," and the plaintiff must be governed by the description in the patent. The patent refers also to Cromwell's road, and to the lands theretofore granted to Ann Tiernan, and both of these are made the limits of the plaintiff's land in these respective directions. These references are made according as these limits appear upon O'Hanly's plan.

The plaintiff's contention is to drive the defendant to the south of Cromwell's road, as marked on O'Hanly's plan, instead of leaving her land to the north of it, as it is shewn on the plan.

The plaintiff says that the Cromwell road itself must be moved to the south, so that the defendant's land will still be immediately upon and to the north of it.

If the plaintiff must take only according to O'Hanly's plan, then the defendant, whose property is described on that plan, must take the property which is there marked

as hers. Mrs. Tiernan, at any rate, was in possession when O'Hanly's plan was made and when the grant was made to Keys, under which the plaintiff claims, and that possession corresponds with the plan, and the plaintiff must be held to be governed by the possession as and which Mrs. Tiernan then had.

The defendant is not bound to follow the south limit of the lot wherever that limit may be fixed. She is entitled to hold it as she has held it, and has it under the patent to the grantee, Ann Tiernan, from whom she claims, and according to the documents and plans in the Crown Lands office when that patent was made; and the nonsuit was right: *Dunn v. Turner*, 3 C. P. 104; *Doe d. Murray v. Smith*, 5 U. C. R. 225; *Doe d. Notman v. McDonald*, 5 U. C. R. 321; *Keely v. Harrigan*, 3 C. P. 173; *Richmond v. Ferris*, 6 C. P. 163; *Bell v. Howard*, 6 C. P. 292; *Juson v. Reynolds* 34 U. C. R. 174.

Harrison, Q. C., supported the rule. The two patents must be read together. The Crown intended to grant the whole of the front part of lot 29 to Keys and to Mrs. Tiernan. The patent under which the defendant claims was first granted. That parcel of land must then first be ascertained, and the plaintiff will take the residue of the front part of the lot, wherever that residue may be. The plaintiff must, of course, be governed by Ann Tiernan's land, for it is expressly made one of his boundaries. Her land must be fixed, not according to O'Hanly's plan, for her patent makes no reference to it, but according to where its true position on the ground should be. Her land is immediately to the north of the Cromwell road, which is at the south of lot 29. The true question here is, where is the south boundary of that lot? When that is determined the defendant will take nine chains in width to the north of the road, and the plaintiff will take all to the north of the nine chains. The Cromwell road is not marked out upon the ground. No help is got from where its actual marked position is. Its described position at the limit between lots 28 and 29 is the only one that can be given

to it. If the defendant succeed, there will be a parcel of about nine chains in width to the south of her land, being a part of lot 29, which has not been granted to any one. O'Hanly's report states that there were opulent persons to the south of Mrs. Tiernan who claimed this strip. He referred to Consol. Stat. U. C., ch. 93, secs. 12, 14; *Carrick v. Johnston*, 26 U. C. R. 69; *Lyle v. Richards*, L. R. 1 H. L. 222; *Clark et al. v. Bonnycastle*, 3 O. S. 528.

WILSON, J., delivered the judgment of the Court.

The question at the trial was whether the statement in the writ of the title of the claimant was true or false. And that statement was whether the plaintiff was entitled to the possession of the land in question, and to eject all other persons therefrom.

The plaintiff must recover on the strength of his own title. The defect of the defendant's title can be of no consequence to him, if he have no right himself.

The question here is simply this, whether the grant to the plaintiff is to be read and governed by the words contained in the patent under which he claims.

The words are, that the Crown granted to Archibald Keys "all those parcels or tracts of land * * being composed of part of lot 29, in concession A. * * according to a plan of survey by Provincial Land Surveyor J. L. P. O'Hanly, dated on the 9th of January, 1860, of record in the Crown Lands Department."

There was such a plan then in the Department, and that plan expressly shewed upon it the side lines of lot 29 as they then were, and the side lines of the lot as they would be by an equitable division.

And it shewed also the widow Tiernan's possession to be according to the then condition of the side lines, and just as the defendant now claims it to be.

The plan was made in January, 1860, while the grant to widow Tiernan was not made till September, 1861. She must at the time of O'Hanly's survey have been occupying just as stated on his plan the very land now in question, under some lease or license from the Crown.

She was certainly then occupying the land, because O'Hanly's field-notes and reports accompanying his plan shew that she was then living just where her name is written. So Thomas Tiernan's name is written upon the plan as representing the residue of the front part of the lot to the north of Mrs. Tiernan's, although the patent to Keys had not then issued for it, and did not issue till July, 1862.

Keys must have been the original nominee for the northerly part of the front part of the lot, and he probably assigned his interest before the patent to Thomas Tiernan, who was the actual resident when O'Hanly made his survey, in January, 1860.

The patent issued in Keys' name. The plaintiff claims from Keys as follows: The plaintiff claims as heir-at-law of Michael O'Donnell, the grantee of Patrick O'Donnell, the grantee of Thomas Tiernan, the grantee of Keys, the patentee.

O'Hanly's plan, besides setting out Mrs. Tiernan's land and that of Thomas Tiernan according to their position of the side lines of the lot, sets out Cromwell's road also according to their position at the side lines.

Then the patent under which the plaintiff claims, describes his northerly and southerly boundaries as on a course S. $60^{\circ} 2' 18''$ W., which was the course of the side lines then occupied by, according to O'Hanly's plan, while the other lines which O'Hanly says would make an equable division, are on a course S. $58^{\circ} 30' 42''$ W., and by Sparks's plan the true north and south limits of the lot are S. $58^{\circ} 18' 53''$ W.

The Crown must therefore have described the land granted to Keys, so far as courses are concerned, according to O'Hanly's plan.

Then again the grant to Cromwell of the rear part of the lot, in May, 1858, describes the north and south limits of the lot as on a course S. 66° W., and there was a plan produced from the Crown Land office, dated in June, 1859, shewing that to be the course of the north and south limits of the lot. The patent to Keys was not according to that plan.

The patent to Mrs. Tiernan states her north and south limits to be S. $60^{\circ} 2' 18''$ W., which is according to O'Hanly's plan, and the same courses which are in Keys's patent.

The patent to Keys describes his land as running back to the rear part of the lot which was granted to Cromwell, then as following Cromwell's easterly boundary down to the northerly limit of Cromwell's road allowance, then along that road allowance "to the lands heretofore granted by the Crown to Ann Tiernan," and so it proceeds, setting out other courses, to the place of beginning.

Cromwell's land, and his road allowance, and the land granted to Ann Tiernan are all upon O'Hanly's plan. And the courses of these different properties which are and as they are described in Keys's patent, are to be found in O'Hanly's plan and in Mrs. Tiernan's patent, and nowhere else.

These are very strong facts to shew, in addition to the positive language of the patent, that the reference to O'Hanly's plan was not a mere statement to be acted upon, or rejected, or varied, according to the true limits of the lot; or, in other words, that it was to be of no effect unless it was found to be in accordance with the original survey or with the legal limits of the lots as they may now be found by a division according to the Sparks's survey, of the total width of the five lots, from 28 to 32, both inclusive, where the only original monuments, at the south-east of 28 and at the north-east of 32, are to be found.

The original survey must have been loosely made, when the surplus in that distance is more than nineteen chains, thus giving to each lot 23 chains, 85 links.

According to O'Hanly's plan, the plaintiff, if he have all the land which is marked by the name of 'Thomas Tiernan,' must have his full complement of land, and it is not said the plaintiff has any less land than Thomas Tiernan had.

The effect of his recovering would be to give him a much larger quantity of land than was granted to Keys, and to drive the defendant further south, and into litigation with others who would probably dispute her right.

We should not interfere with possessory and vested rights unless we are obliged to do so.

We think the legal limits of the lot are according to Mr. Sparks's survey, which would be about in the same place where the lines are marked on O'Hanly's plan as the lines which would make an equable division.

And it may be that the defendant, while retaining her present possession as against the plaintiff, by reason of the limited form of the grant to Keys, may be able to push her claim to the land along the actual true south limit of the lot under the general grant to the widow Tiernan.

Whether that can be so or not is of no consequence to the plaintiff, if he cannot encroach upon the defendant. And we think he cannot.

The grant to Keys "according to a plan of survey by O'Hanly, dated the 9th of January, 1860, of record in the Crown Lands Department," is too specific to be got over by any kind of reasoning.

The Crown might have granted the residue of the front part of the lot after the grant to Mrs. Tiernan without making any such reference to O'Hanly's plan,—in which case the plaintiff would have been entitled to that part of the lot, as it could be distinguished by the original survey, or as it should be ascertained by a subdivision between the nearest original monuments.

In such a case he could have forced the defendant and Cromwell's road to the southerly limit of the lot. But the Crown was not obliged to grant the land according to the original survey, and it has deliberately chosen not to do so.

It has expressly granted the land, *according to* O'Hanly's survey, and in no other way. And there can be no doubt that the plaintiff must take the land just as it was given to him, limited and governed by the terms of the grant as they operate and were intended to operate.

It might be reasonable enough that the plaintiff should first locate the defendant at the true south limit of the lot, and then take the residue of the front part of the lot because his land extends southerly to her land. The

defendant would not, in reality, lose anything in such a case. And that has been and is his argument.

But that is not what his patent says. The patent says he shall take his land "according to O'Hanly's plan of survey," and that survey has taken the side lines, *as they then were*, as the true north and south limits, and not those lines which would make an equal division. The words of the patent cannot be rejected.

The case of *Lyle v. Richards*, L. R. 1 H. L. 222, was referred to by the plaintiff's counsel, and has a very strong bearing on the case.

There a lease was made, and one of the boundaries was stated as follows: bounded "on the south by a straight line of about 355 fathoms from John Vincent's house, at the south-west extremity of the sett, to a bound stone at the north-west extremity of South Wheal Bassett sett;" and the description concluded, "and which said premises are particularly delineated by the map on the back of this sett."

John Vincent's house was marked on the plan 44 fathoms further to the west, and also something further to the south than it really was. The boundary line as represented on the map did appear to enter John Vincent's house at the north-east corner.

The defendant contended that a line should be drawn from the north-east corner of Vincent's house to the bound-stone. The Queen's Bench decided in favour of the plaintiff. The Exchequer Chamber reversed that decision. The House of Lords affirmed the judgment of the Exchequer Chamber.

The Lord Chancellor said, L. R. 1 H. L. pp. 230, 231, 232: "The boundary line which the jurors were bound to take as that indicated in the plaintiff's sett was a line from John Vincent's house to the bound-stone in question. This, however, does not make the exact line clear. The bound-stone may, for practical purposes, be treated as a mere point, but this cannot be said of John Vincent's house, the depth of which from north to south

is shewn by the evidence to be twenty or twenty-five feet. It is obvious, therefore, that the line, if drawn from the north-east corner of the house, will give to the plaintiff a less quantity of mine than if drawn from the south-east corner * * Now, on the map the boundary line is clearly drawn from the north-east corner of John Vincent's house; and the Judge, or the Court, was bound to treat this as if, in the description of the parcels, the language had been, not a line from John Vincent's house, but a line from the north-east corner of John Vincent's house. * * These inaccuracies, (of the house and bound-stone) however, appear to me to be unimportant. The map is referred to not for the purpose of shewing the site either of the house or the bound-stone. The facts as to the true position of the house and boundstone are ascertained by other means. The use of the map is to clear up what without it was uncertain, namely, from what part of the house the line was to be drawn; and for that purpose its exact site was immaterial."

Lord Westbury dissented. He said, at pp. 240, 241: "The map here is not a statement that the southern boundary line is to run from the north-east corner of Vincent's house in its actual true position, but from the north-east corner of that false site which is erroneously laid down. * * It is assumed that the map amounts to a statement that the boundary line is to run from the north-east corner of John Vincent's house, *wherever that house may be*. But, with great submission, there is no such statement. The map states only that the line runs from the north-east corner of the house, *as there laid down*."

There the wrong position of Vincent's house and the bound-stone were not held to be important; that it might be shewn where their true sites were, although the lease contained the words "and which said premises are particularly delineated by the map on the back of this sett;" and although the map was held to be a part of the lease. So here it is contended for the plaintiff that the delineation of Mrs. Tiernan's land on the particular part of O'Hanly's

plan where it is placed, is not material: that it may be shewn to have been erroneously placed there: that it may now be located where its proper position really ought to be; and that the object of the plan was not to fix or define where her land was to be or should be, but for the mere purpose of showing where it was, and the further fact that the boundary lines north and south were not settled, but were even then in dispute.

The fact that the lines were in dispute, and that Mrs. Tiernan was then actually settled upon the land which the map represented, that is, according to the then accepted and actual side lines of the lot; and that Thomas Tiernan, who claimed from Keys, and from whom the plaintiff claims, was then described on the same map as the actual resident of the land, to which alone by the courses the boundaries can accurately apply, are strong reasons why the then actual site and condition of the occupations should not be changed as respects the plaintiff, and why the grant under which he makes title should have and take effect "according to the plan of survey of the same by O'Hanly, P. L. S., of the 9th of January, 1860, and now of record in the Crown Lands Department," and according to it alone.

I may refer also to *Dodd v. Burchell*, 1 H. & C. 113; *Webber v. Stanley*, 16 C. B. N. S. 698; and *Pedley v. Dodds*, L. R. 2 Eq. 819. The rule will be discharged.

Rule discharged.

Regula Generalis.

The following Rule was read in Court on Saturday, 23rd May, 1874 :—

“ IN THE COURTS OF QUEEN’S BENCH AND COMMON PLEAS.

GENERAL RULE.

Easter Term, 37 Vic., A.D., 1874.

It is ordered that General Rule No. 2 of Trinity Term, 24 Victoria, be rescinded, and that the following be substituted therefor :—

The offices of the Clerks of the Crown and Pleas shall be kept open as follows, that is to say, during Term from ten in the morning till four in the afternoon, and (except between the 1st day of July and 21st day of August) at other times from ten in the morning until three in the afternoon : Sundays, Christmas day, New Year’s day, Good Friday, Easter Monday, the Birthday of the Sovereign, and any day appointed by general proclamation, either by the Government of the Dominion of Canada, or by the Government of Ontario, for a general holiday or for a general fast or thanksgiving, excepted ; and between the first day of July and twenty-first day of August, both days inclusive, when the said offices shall be open from half-past nine in the forenoon until twelve o’clock noon, excepting such days on which the offices may be closed as herein-before provided.”

23rd May, 1874.

(Signed)

WILLIAM B. RICHARDS, C. J.
JOHN H. HAGARTY, C. J. C. P.
JOSEPH C. MORRISON, J.
ADAM WILSON, J.
JOHN W. GWYNNE, J.
THOMAS GALT, J.

MEMORANDA.

During this term the following gentlemen were called to the Bar :—

JOSEPH EGBERT TERHUNE, PETER MCGILL BARKER, CHARLES EGERTON RYERSON, ALFRED SERVOS BALL, CHARLES EDGAR BARBER, FRANK D. MOORE, HAMMILL MADDEN DEROCHE, CLARENCE WIDMER BALL, E. GEORGE PATTERSON, GEORGE LEVACK B. FRASER.

On the 6th day of June, 1874, His Excellency the Governor General appointed THE HONORABLE SAMUEL HENRY STRONG, one of the Vice Chancellors of the Court of Chancery, Senior Justice of the Court of Error and Appeal of Ontario, under the Act of Ontario 37 Vic. ; and on the 13th of June, 1874, GEORGE WILLIAM BURTON, Esquire, one of Her Majesty's Counsel, and CHRISTOPHER SALMON PATTERSON, Esquire, also one of Her Majesty's Counsel, Justices of the said Court.

TRINITY TERM, 38 VICTORIA, 1874.

August 24th to September 5th.

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

TOMS ET UX. V. THE CORPORATION OF THE TOWNSHIP
OF WHITBY.

*Approaches to bridge—Duty to protect by railing—Remote and proximate cause
of accident—Excessive damages.*

The plaintiff and his wife sued defendants for injury alleged to have been caused to the wife by their neglect to have a railing or guard along an embankment leading down to a bridge on one of their leading highways in a populous township. It appeared that the wife and her son, about eight years old, were crossing the bridge in a buggy, when the horse shied at some new planks on the bridge, and backed to the end of it, where the hind wheels went over the bank, throwing her out and into the water, about fourteen feet below. The jury found, upon the evidence set out in the case, that the road was not in a sufficiently safe state, and that the wife was guilty of no negligence in the management of the horse.

Held, Morrison, J., doubting, that it was the duty of defendants to fence or guard the place in question: that the injury was caused by the want of such protection as the proximate cause, not by the horse becoming frightened and unmanageable; and that defendants therefore were liable.

The authorities, as to remote and proximate causes of damage, reviewed. The damages, \$2,500, being in the opinion of the Court excessive, a new trial was granted on that ground, on payment of costs, unless the plaintiffs would consent to reduce the verdict to \$1,250.

DECLARATION:—that a certain highway was vested in the defendants, part of which was known as Way street, and was composed of a bridge across a stream, and certain embankments or approaches to the bridge, which bridge and embankment were constructed by defendants, to be used by the

public as part of a highway; and it was the defendants' duty to use due and proper care and skill in the construction of the bridge and embankment, and to have placed proper guards and railings along the sides thereof, so as to render the highway safe and convenient to travel thereon; yet defendants neglected their duty, and constructed the bridge and embankment and the approaches thereto with so little care, and neglected to guard or fence the side of the embankment, that by reason thereof Elizabeth Jones, while in a buggy in her charge, and without any neglect, was backed by the horse off the embankment and greatly damaged.

Second count: for damages claimed by the husband for injury to his wife, causing consequential injury to the husband.

Pleas: 1. Not guilty by statute, Consol. Stat. U. C. Ch. 126, secs. 1, 10, 11, 16, 20.

2. That the alleged highway was not vested in the defendants as a public highway.

3. That defendants used due and proper care and skill in the construction of the bridge and embankment, and placed proper guards and railings along the sides thereof.

Issue.

The cause was tried before Wilson, J., and a jury, at the last Fall Assizes held at Whitby, and a verdict was rendered for the plaintiffs on the first count for \$2000, and on the second count for \$500 damages.

The following evidence was given:

Mrs. *Toms* said that about the last day of May, 1870, she and her son, a boy then about eight years of age, left home, near to Oshawa, in a buggy with one horse, to go to some of her relations to the north-west of Brooklyn, a distance of about eight miles. It was about six in the afternoon when they set out. On the way they came to a bridge. As they were crossing the bridge the horse shied at some new planks which had been laid on the roadway of the new bridge. The horse backed along the bridge the way it had come and to the side of the road just at the end of the bridge. She tried to urge it forward. She had no time to

use the whip before she was over. There was something at the place of the accident—a rail or something temporary; she heard something break; both hind wheels went over the bank; she and the boy were thrown or fell out of the waggon into the water below; the horse and buggy did not go over the bank. She said the boy was in the water apparently dead. She got up and her back was very bad; her spine seemed to be injured. She had not fully recovered when giving evidence. She was no stronger now than she was then.

It appeared she walked, with help, to a house close by, and was then driven by James Elford to her brother's, where she was going, where she was detained for about ten days by illness, before she could be moved to her own home. She had medical assistance.

It was admitted that the place of the accident was on the public highway.

John Shier, P. L. S., said:—There is water flowing under the bridge. The road is not the full width where the accident happened. The width should be three rods. It is less than that by about six feet. The wash of the pond water passing under the bridge has washed away part of the roadway and narrowed it. The distance from the road surface to the water below is fourteen feet—eight feet a perpendicular fall, and the rest of the fall a slope. There was a plank sidewalk at the bridge. The planks were undermined. They answered the purpose of a sidewalk and also of supplying the defect in the road by the washing of part of it away. There was no guard at the time of the accident. I think there was one originally. When I saw the place after the accident there was a large square stick of timber on the plank which prevented teams from going over. An outlay of \$15 or \$20 would have made the place safe. The bridge is at an angle of the road. I think it was a place that should have been railed or guarded. It was very much travelled. The Brock and Uxbridge road comes down by this road. The bridge is eighteen feet wide; I can't say the length of it. No accident ever happened there

before that I know of, and I have known the place for 28 years. With ordinary care a reasonably competent driver could drive over without an accident (he afterwards said). The place should have some protection.

James Alford said :—There was a space of 15 or 18 feet wide, after the accident, not protected. The rail that was at the place before the accident was a four inch scantling 12 to 14 or 15 feet long.

Samuel Toms said :—There was, beside the part where the scantling was before the accident, a further space of about 15 feet not protected at all.

Alfred Turner said :—I am a carpenter. I built this bridge in 1861 or 1862. When it was building we put a scantling, 6×4 or 6×3 and 12 feet long, at the end of the bridge along the bank into the earth. Then there was not so much need of it as since, for there was then a space of 10 feet or more of bank more than there is now. It has been washed and crumbled away by freshets and frosts. The bank was washed away at the end of the rail where it rested on the ground, and the rail hung by the fastening at the post by the bridge, and at the time of the accident the end of the rail at the ground had rotted away, and it then rested upon and was fastened to the planks. The planks were put along to cover a part of the bank which had been washed away. I travel that part of the road six or eight times a day. Before the accident I told the pathmaster the place should be protected, because somebody would be injured yet. I said so, because one day I had seen where the wheels of a waggon had driven within two inches of the side of the plank.

There was some other evidence, not now important, given for the plaintiffs, besides the medical testimony.

At the close of the plaintiffs' case, *Harrison*, Q. C., moved for a nonsuit on the following grounds:

1. No non-repair of the road or bridge was shewn, within the meaning of the Municipal Act.

2. There was no legal obligation on the defendants to fence or rail the bridge or the approaches.

3. No negligence on the part of defendants was shewn.
4. If there were an obligation to guard the place, that duty had been sufficiently performed.
5. The alleged negligence of the defendants was not the proximate cause of damage.
6. The immediate cause of the accident was the violence or fright of the horse acting without guidance or discretion.
7. The defendants were not bound to have the highway safe except for ordinary travel.
8. There was no obligation to keep the highway safe for affrighted or runaway horses ;
9. There was contributory negligence of Mrs. Toms : there was negligence in her driving.

McMichael, Q. C., for the plaintiffs, answered the objections.

The learned Judge determined that the case must go to the jury.

For the defence a good deal of evidence was given to shew that the road was safe : that Mrs. Toms must have been driving carelessly or was incompetent to manage a horse on the road ; and that she had not been injured by the accident to the extent alleged.

At the close of the evidence the defendants' objections were renewed to the whole case. They were over-ruled, but leave was reserved to the defendants to move upon them.

The jury were asked to find : 1. Whether the road was in a sufficiently safe state for persons who drive along the road ?

2. Was Mrs. *Toms*, or were she and her boy together, reasonably fit and competent to drive the horse along the road ?

3. Was Mrs. *Toms*, or were she and her boy, guilty of negligence in managing the horse at the time of the accident, so that their management or mismanagement of the horse was the occasion, the proximate cause, of the damage—so that but for such negligence the injury would not have happened ?

4. If the findings were for the plaintiffs, then what damages should be awarded ?

The evidence, both in the addresses and in the direction to the jury, was fully commented upon, and the different points left to the jury were accompanied with full explanations, to enable them to deal with the same.

They found on all points in favour of the plaintiffs, with \$2000 damages on the first count, and \$500 on the second count, as before stated.

In Michaelmas Term last, *Harrison*, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the same grounds substantially as taken at the trial as grounds of nonsuit; or why a new trial should not be had, on the ground that the verdict was contrary to law, evidence, and the weight of evidence; and for excessive damages; and for non-direction and mis-direction as to damages, in this, that the learned Judge refused to tell the jury that the plaintiff Samuel Toms could not recover under the second count for damages or loss sustained after the commencement of this action, and allowed the jury to give damages for damage and loss after the commencement of the action; or why the judgment to be entered on the said verdict should not be arrested, on the ground that there is no duty cast on the defendants as in the first and second counts of the declaration alleged.

In Hilary Term, *McMichael*, Q. C., shewed cause.

The jury found the road was not repaired according to the provisions of the Municipal Act; and there is an obligation to fence a dangerous part of the road: *Harrold v. The Corporation of the County of Ontario et al.*, 16 C. P. 43, in appeal 18 C. P. 9; *Regina v. The Corporation of the Village of Yorkville*, 22 C. P. 431. It will be argued that if the road be a good solid road on the surface the defendants were not bound to fence it. That is not the doctrine of the cases, or as stated in text writers: *Addison* on Torts, 4th ed., 168, 169, 170; *Indermaur v. Dames*, L. R. 1 C. P. 274, affirmed in Ex. Ch. L., R. 2 C. P. 311; *Holmes v. The North Eastern R. W. Co.*, L. R. 4 Ex. 254; *John v. Bacon*, L. R. 5 C. P. 437; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Angell* on Highways, 2nd ed., sec. 262; *Shearman &*

Redfield on Negligence, 3rd ed., sec. 391. The cause of action against the defendants is, that they are answerable for the plaintiffs' damage resulting from the accident. The plaintiffs say the cause of action and of damages is the defective state of the highway. But it is said the proximate cause was the violence or fright of the horse, and the defendants will urge they are not bound to fence or provide against that, nor are they liable even for defects of highway when a runaway or unmanageable horse is injured by reason of such defects. The proximate cause of loss, however, was the dangerous condition of the road where the accident happened. It was not that the horse was not manageable, although that led on to the ultimate mischief. *Titus v. The Inhabitants of Northbridge*, 97 Mass. R. 258, appears to be a decision for the defendants, but it is not admitted to be a correct statement of the law, and, besides, it excepts the case of a horse shieing as in the present case.

He referred also to *Hyatt v. The Trustees of the Village of Rondout*, 44 Barb. 385; *Foreman v. The Mayor, Aldermen, and Burgesses of Canterbury*, L. R. 6 Q. B. 214.

Harrison, Q. C., supported the rule. The defendants must be entitled to arrest the judgment, unless a railing be required by law to be put to the road or bridge. There is no such duty imposed on the defendants by statute. The following cases were cited on this point:

Wilson v. The Mayor and Corporation of Halifax, L. R. 3 Ex. 114; *Cornwell v. The Metropolitan Commissioners of Sewers*, 10 Ex. 771; *Crafter v. The Metropolitan R. W. Co.*, L. R. 1 C. P. 300; *Sparhawk v. The City of Salem*, 1 Allen 30; *Collins v. The Inhabitants of Dorchester*, 6 Cush. 396. If it were the duty of the defendants to fence, the evidence shews the place was sufficiently protected: *Bateman v. The City of Hamilton*, 33 U. C. R. 244; *Dillon* on Mun. Corp., 2nd ed., sec. 790 and notes. If it were not sufficiently fenced the defendants had no notice of the insufficiency. There was, in fact, a rail or guard at the place, which was broken by the plaintiffs' collision. The defendants did not know of it, and it was not apparently defective.

There can be no action against the defendants unless they could be indicted also for the same defect, and no indictment would lie here: *Ringland v. The Corporation of the City of Toronto*, 23 C. P. 93 (a); *Rex v. Tindall*, 6 A. & E. 143; *Regina v. Betts*, 16 Q. B. 1022; *Rex v. Russell*, 3 E. & B. 942; *Howard v. The Inhabitants of North Bridgewater*, 16 Pick. 189; *Sykes v. The Town of Pawlet*, 5 Am. R. 295. The want of repair, if it be as it was found by the jury, was not the cause or the proximate cause of the damage. That was occasioned by the fright or violence of the horse, or by the fright or incompetency of the driver. The sole cause of injury was, at any rate, not the state of the road, and that being so, the plaintiffs cannot recover: *Soule v. Grand Trunk R. W. Co.*, 21 C. P. 308; *Flower v. Adam*, 2 Taunt. 314; *Adams v. The Inhabitants of Carlisle*, 21 Pick. 146; *Marble v. The City of Worcester*, 4 Gray 395; *Davis v. The Inhabitants of Dudley*, 4 Allen 557; *Moulton v. The Inhabitants of Sanford*, 51 Maine 127; *Titus v. The Inhabitants of Northbridge*, 97 Mass. 258; *Horton v. The City of Taunton*, 97 Mass. 266, note. The bad driving or incompetency of the woman to drive a horse or to manage it when frightened was established by the evidence, and so made her a party to her own wrong. In such a case there can be no recovery: *Butterfield v. Forrester*, 11 East 60; *Smith v. Smith*, 2 Pick. 621; *Cobb v. Inhabitants of Standish*, 14 Maine 198; *Bradley v. Brown*, 32 U. C. R. 463. See also the cases last above cited. The damages are also very excessive. The first verdict was only for \$800: *Toms et ux. v. Corporation of Whitby*, 32 U. C. R. 249. The present sum of \$2500 is not in any way warranted by the evidence.

WILSON, J.—Upon perusing the evidence, we are of opinion that it must be accepted as settled that the place of the accident was a place of some danger, and should have been better protected than it was, if the defendants were obliged to fence it at all; and that the injury was done to Mrs. Toms without any default or want of care or skill on her part, by reason of the want of such a guard, unless the cause is to

(a) See also *Rex v. Corporation of Petrolia*, 23 C. P. 73, 77.

be attributed to the fright of the horse and the driver having lost control of it.

The questions then are: 1. Were the defendants bound to fence that part of the road ?

And if they were, 2. Was the absence of such a fence the proximate cause of the damage, or was it the uncontrollable action of the horse ?

3. Are the defendants liable for injuries resulting from uncontrollable animals, although the highway is defective or dangerous, and is a cause or a principal cause of the accident ?

The first question, as to the liability of the defendants to fence, arises on the record as well as on the evidence. It is the ground of the motion in arrest of judgment.

The first count alleges that the defendants "constructed the bridge and embankments or approaches to the bridge to be used as part of a highway, and it was their duty to have placed proper guards and railings along the sides thereof, so as to render the highway safe and convenient to travel thereon." Is that a proper statement of the defendants' duty ?

The Municipal Act of 1866, which is the one that was in force at the time of the accident, provided that the defendants might pass by-laws "for making regulations as to pits, precipices, and deep waters, and other places dangerous to travellers." Sec. 333, sub-sec. 4.

And by sec. 339, "Every such road, street, bridge, and highway shall be kept in repair by the corporation, and the default of the corporation so to keep in repair, shall be a misdemeanor punishable by fine in the discretion of the Court, and the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default."

In *Cornwell v. The Metropolitan Commissioners of Sewers*, 10 Ex. 771, the defendants were charged with liability for not protecting their open sewer, situate in a public street.

The fact was, that there was an ancient dyke there before the highway, and the defendants only made use of the dyke as their sewer, and it was held they were not bound to fence it as against persons using the highway.

Pollock, C. B., at p. 773, put it on the ground that, "In this country there are some hundreds of miles of highways, on the sides of which there are ditches; but no body ever supposed that the owners were under any obligation to fence them."

Parke, B., at p. 774, rested the decision on the ground that, "It is the case of a road dedicated to the public, with a sewer beside it * * and therefore the public have only a right to the highway subject to the sewer."

The Commissioners were not bound to fence against the highway. It seems more proper, as was said in the following case, for the highway to be protected against the sewer.

In *Hardcastle v. The South Yorkshire & River Dun Co.*, 4 H. & N. 67, the defendants were charged with liability for not guarding, fencing off, or railing in their land, and a reservoir, hole, or dam, to prevent injury to persons using the highway, within a short distance of the reservoir.

The Court determined there was no liability on any one to fence on his land any hole or excavation which was not substantially adjoining to the highway; and as the reservoir was some little distance from the highway, the defendants were not bound to fence the reservoir as against the highway.

Watson, B., asked, at p. 71, "Why should not the person whose duty it is to repair the highway fence it?"

Pollock, C. B., said, at p. 75, "If fences are to be put up, it would seem more reasonable that they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicated it to the public, or his successors; and we are clearly of opinion there is no such obligation to fence as alleged in the declaration."

In *Wilson v. The Mayor and Corporation of Halifax*, L. R. 3 Ex. 114, the charge also was that the defendants, the local board, had not fenced or guarded a goit, hole, or place near to a street which, for the want of it, was dangerous to persons passing along the street.

It was held that the 83rd sec. of the 21 & 22 Vic., ch. 98, which provided that "If any building, or hole, or any

other place near any street be, for want of sufficient repair, protection, or inclosure, dangerous to the passengers along such street, the commissioners shall cause the same to be repaired, protected or enclosed, so as to prevent danger therefrom," did not apply to such a place as the goit; and also that the enactment that the commissioners *may* "place and keep in repair fences and posts for the safety of foot passengers," did not make it compulsory upon the defendants to fence the goit.

No one is at liberty to make or to leave an excavation unguarded, of any kind, adjoining the highway, if it render it unsafe to use the highway: *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Binks v. The South Yorkshire R. W. & River Dun Co.*, 3 B. & S. 244.

There is an obligation in such a case to fence the excavation off as against the highway. The case just referred to plainly supports that proposition.

In *Barnes v. Ward*, 9 C. B., at p. 411, Byles, Sergt., for the defendant, said: "There is no common law duty on the owner of land to fence a ditch or area adjoining a highway. Many instances will readily present themselves, of public walks and highways adjoining cliffs and precipices; among these may be instanced, the ways between Margate and Ramsgate, and from Folkstone to Sandgate. So, in the fens, the common fence of the country is a deep ditch, of a date in most cases subsequent to the formation of the roads. (Wilde, C. J., mentioned the path along the side of the New River, at Islington)."

I presume it must be the law of England, that the public having accepted a road along a precipice or along a river, or having a dyke or excavation near it, there is no obligation on any person or body of persons to fence it off from the precipice, &c., although there is a danger attending the use of the road without some kind of protection.

If the road dedicated were, by reason of a precipice or excavation, or from any other cause, so dangerous that it could not be safely used as a highway, I see nothing to shew that by English law the "parish" or any one what-

ever was bound, if the public accepted and used the road, to fence or gravel it for the public benefit, against these natural and existing dangers.

But if any one were to excavate upon it or near to it, or were to leave any obstruction upon it, or to do anything whatever to it, so as to make travel upon it unsafe, it would be a nuisance; and for any damage resulting, he would be liable.

In *Barnes v. Ward*, 9 C. B. at p. 412, Williams, J., said: "Suppose there be a public right of way across a field, and the owner of the land excavates the soil so as to form a precipice on either side, leaving the pathway untouched, would he be guilty of a nuisance?" Counsel answered, "That would, in effect, render the way impassable."

In giving judgment, Maule, J., said, p. 420: "The danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway."

The earlier law is, that in case of dangerous places made near to or upon highways, the persons who make them must fence against them; it is not said the parish or other body representing the public must do so.

In the later law, under the late legislation, the body bound to repair, as in *Wilson v. The Mayor and Corporation of Halifax*, L. R. 3 Ex. 114, and to guard against whatever is dangerous to passengers, can be made to do so to the extent of their obligations. In that case it was doubted and not decided whether the defendants, although bound to do the act of reparation, could have been sued in a civil action for not having done so, by one who had been injured in consequence.

That part of the case we need not consider, for our statute makes municipalities, in cases of that description, expressly liable in civil actions.

Our legislation on that point has probably been adopted from the United States,—for in several of the States the like remedy is directly given to the person injured.

No civil action lies in England, at the common law, for an injury arising from non-repair of a highway; and under the statutes which have at different times been passed there, it has been held in many cases that no civil action was given by the language of the Acts. The cases are collected and commented on in *Gibson v. The Mayor, Aldermen, and Burgesses of Preston*, L. R. 5 Q. B. 218. In this country it is declared that a civil action will lie against municipalities for non-repair of a highway from which damage results.

Many of the cases already referred to shew that liability does attach to persons by reason of acts which they have done, or acts which they have omitted to do, prejudicial to the highway, where private injury has been sustained.

And they also shew that there is an obligation upon such persons to fence off the part which has been made dangerous to the public, so as to prevent injury happening to persons using the highway.

There is no English case cited which shews that the persons bound to repair a highway are bound to fence it off as against any danger whatever.

In the United States there are many decisions to that effect, under their legislation, which, as already stated, is similar to ours.

A highway along a cliff or precipice, or along a river, or any dangerous excavation, may, as was said in *Barnes v. Ward*, 9 C. B., at p. 412, already quoted, "be in effect rendering the way impassable," and "may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway." But that is where some act has been done making it dangerous. In England there seems to be no remedy against any body, civil or criminal, to compel such a place to be guarded. The public having taken it just as it is, nobody is compelled to make it more secure. But it does not follow, [indeed it is provided to the contrary,] that under our special legislation the law is the same here.

The declaration might be more specific as to the cause of

complaint. It would have been better if it had stated that there was a dangerous descent from the roadway over or from a bank at that place to the water below, close to one end of the bridge, and on and forming part of the highway, which it was necessary and the defendants' duty to guard or protect, in order to prevent persons, their horses, cattle and conveyances from going over the bank; and averring a breach of such duty and damage in consequence.

If a fuller or plainer statement of the cause of action is necessary to be made, and can be made, as we think it can, we should, as was said in *Hardcastle v. The South Yorkshire R. W. and Dun River Co.*, 4 H. & N. 67, 74, "be desirous to aid the plaintiff," if there be a cause of action against the defendants.

I am of opinion, under the enactments referred to in the Municipal Act, that the defendants were bound, as a matter of duty, to fence, guard, or otherwise secure the place of the accident, if it were, as it was found to have been, dangerous to those who were using the road, in order to prevent accident or injury happening from the want of a necessary protection.

Titus v. The Inhabitants of Northbridge, 97 Mass. R. 258; *Horton v. The City of Taunton*, 97 Mass. R. 266, note; *Sparhawk v. The City of Salem*, 1 Allen 30; *Collins v. The Inhabitants of Dorchester*, 6 Cush. 396; *Sykes v. Town of Pawlet*, 5 Am. R. 295; *Marble v. City of Worcester*, 4 Gray 395; *Cobb v. The Inhabitants of Standish*, 14 Maine R. 198; *Davis v. The Inhabitants of Dudley*, 4 Allen 557; *Hyatt v. The Trustees of the Village of Rondout*, 44 Barb. 385; *Adams v. The Inhabitants of Carlisle*, 21 Pick. 146; *Howard v. The Inhabitants of North Bridgewater*, 16 Pick. 189, are all cases of that kind, although in many of them it was found the cause of action failed to be supported by evidence. Our own reports are full of decisions of the like kind.

It is reasonable the public should be protected from all danger on the highways, if possible, by due repairs, or by other proper means,—but at any rate from all danger which

is very great, or which may happen to persons using ordinary care on the highway, or which can be provided for at a reasonably small expense.

It is not pretended the highways can be made perfectly safe. The ditches are, perhaps, in every case, a source of some danger, yet it would be impossible to fence them. Culverts, too, have very often no guards at the ends, which may make them quite as dangerous, if not more so, than the adjacent ditch, yet it may not be reasonable to require they should all of them be so guarded. The sides of the road on the outer side of the ditches are, in the country, seldom made up into shape, or used, and logs and stumps are commonly found there, yet it could not be urged that the municipality should in every case be liable, either criminally or civilly, for such a state of things in case of an accident happening there. Such roads are as good as they are required to be for the use of the public.

Railway companies have been held bound to protect their engines from emitting sparks which were likely to produce injury, so far as such injury could be guarded against. It required no enactment to impose this liability; it arose from the reasonableness and necessity of the case: *Piggot v. The Eastern Counties R. W. Co.*, 3 C. B. 229.

The same principle is contained in *Oliver v. The North Eastern R. W. Co.*, L. R. 9 Q. B. 409, and *Simson & wife v. The London General Omnibus Co.*, L. R. 8 C. P. 390.

I am of opinion, then, if a guard or fence were necessary to make this road and bridge safe for the public use, that it was the duty of the defendants to furnish such protection; and if they did not do it, and damage has resulted therefrom, that they are liable civilly in an action for the injury sustained.

There have been many roads public or otherwise in the Province, where there has been a good deal of danger in driving, and which were not for many years fenced; and some of which may not be fenced to this day.

The road along the Falls towards the Table Rock is not protected, but that, perhaps, may not be a highway, although it is a road of very great travel and resort.

So the road along many of the rivers approaches the banks at times, and there is no fence or protection. Whether there is danger at these places or not to require a protection, I do not say, but if they are public places or highways, and there is danger on account of their unprotected state, there is an obligation upon the municipality to guard against it.

The enactment of the Municipal Act, before referred to, to make provision as to pits, precipices, and deep waters and other places dangerous to travellers, is a special ground of obligation and responsibility upon the defendants.

As to the second enquiry—Did the injury arise from the want of such protection as the proximate cause, or was the proximate cause the uncontrollable action and violence of the horse ?

The occurrences were: the fright of the horse, its becoming unmanageable; its backing the waggon against the rail and breaking it, and forcing the hind part of the waggon over the bank, and throwing the woman and boy out of it, and her injury from the fall.

In *Gilbertson v. Richardson*, 5 C. B. 502, A.'s carriage was driven against the wheel of B.'s chaise. The collision threw a person in the chaise upon the dash board; the dash board fell on the back of the horse, and caused him to kick and thereby the chaise was injured. Held, that B. was entitled to recover in trespass against A. damages commensurate with the whole of the injury sustained.

The plaintiffs say the proximate cause was the dangerous condition of the road, the fright of the horse and its becoming unmanageable being a cause conducing in part to the accident, but not the cause of it in law; and that in fact the most immediate and proximate cause of the injury was the state of the road. The defendants say that the proximate cause in law was the unmanageable conduct of the horse; that but for it the accident could not have happened.

There is another view. May not the defective road be an actionable cause against the defendants, although the frightening of the horse, if it had been wantonly done by another, would have been an actionable cause as against him ?

Would not that person and the defendants have each been wrongdoers? If that be so, it follows the defendants may be responsible, for they are still wrongdoers, although no one else was to blame in producing the accident; and the more so because no one but themselves did produce it.

What then was the proximate cause? That will be best seen by an examination of the cases, although it is not an easy matter to say what or which event in the order of sequence may be treated as the actionable or proximate cause of action.

It will be found that we are not, in all cases, restricted to the immediate cause; and we are not permitted to follow the "causes of causes," nor the "*causa sine quâ non*," as the ground of action.

The maxim is, "*In jure non remota causa sed proxima spectatur.*"

The application of the maxim is attended with difficulty at times.

In *Montoya v. The London Assurance Co.*, 6 Ex. 451, 458, Parke, B., said, "The question in each case is, what is *causa proxima*, and what *causa remota*. There is great difficulty * * in saying where the precise line is to be drawn; and it is often no easy matter to decide whether a particular case falls within it or not."

In *Scott v. The Dublin and Wicklow R. W. Co.*, 11 Ir. C. L. 377, Pigot, C. B., at pp. 392, 393, speaks of "The distinction between remote and proximate causes,—a subject which has perplexed metaphysicians from the days of the disquisitions of the Schoolmen down to those of the essays of Hume and Brown."

In *Sneesby v. The Lancashire, and Yorkshire R. W. Co.*, L. R. 9 Q. B. 263, Blackburn, J., said, p. 267, "The rule is sometimes difficult to apply."

And in *Ionides v. The Universal Marine Insurance Co.*, 14 C. B. N. S. 259, Byles, J., said, at p. 296, "I do not propose to attempt to discriminate between the various descriptions of causes, with their effects or results; that is a matter which was discussed two thousand years ago, by abler

intellects than any now existing. But this is plain, and is admitted on all hands, that, in the construction of the contract of insurance, the proximate or immediate cause of the loss alone is that to which we can look."

In *Burton v. Pinkerton*, L. R. 2 Ex. 340, Bramwell, B., p. 350, said, "It is true, that in one sense the defendant's conduct *caused* the imprisonment; but for that, no doubt the plaintiff would not have been imprisoned. That, however, is not enough."

There is a quotation of considerable length, which may be excused if it is made, as it is, from an able writer, and which is directly applicable to this subject.

He says, "If a person eats of a particular dish, and dies in consequence, that is, would not have died if he had not eaten of it, people would be apt to say that eating of that dish was the cause of his death. There needs not, however, be any invariable connexion between eating of the dish and death; but there certainly is, among the circumstances which took place, some combination or other upon which death is invariably consequent: as, for instance, the act of eating of the dish, combined with a particular bodily constitution, a particular state of present health, and perhaps even a certain state of the atmosphere; the whole of which circumstances perhaps constituted in this particular case the *conditions* of the phenomenon, or, in other words, the set of antecedents, which determined it, and but for which it would not have happened. The real cause is the whole of these antecedents, and we have, philosophically speaking, no right to give the name of cause to one of them, exclusively of the others. * * * But although we may think proper to give the name of cause to that one condition, the fulfilment of which completes the tale, and brings about the effect without further delay, this condition has really no closer relation to the effect than any of the other conditions has:" *Mills's Logic*, N. Y. ed. of 1872, pp. 197, 198.

Again, he says, "And in practice that particular condition is usually styled the cause, whose share in the matter is superficially the most conspicuous, or whose requisiteness to

the production of the effect we happen to be insisting upon at the moment. So great is the force of this last consideration, that it oftentimes induces us to give the name of cause even to one of the negative conditions. We say for example, 'The army being surprised, was because of the sentinel being off his post.' But since the sentinel's absence was not what created the enemy or made the soldiers to be asleep, how did it cause them to be surprised? All that is really meant is, that the event would not have happened if he had been at his duty. His being off his post was no producing cause, but the mere absence of a preventing cause; it was simply equivalent to his non-existence. From nothing, from a mere negation, no consequences can proceed. All effects are connected, by the law of causation, with some set of *positive* conditions. Negative ones, it is true, being almost always required in addition * * * *Ibid*, 199.

And again, "Since, then, mankind are accustomed with acknowledged propriety, so far as the ordinances of language are concerned, to give the name of cause to almost any one of the conditions of a phenomenon or any portion of a whole number arbitrarily selected, without excepting even those conditions which are purely negative, and in themselves incapable of causing anything, it will probably be admitted without longer discussion, that no one of the conditions has more claim to that title than another; and that the real cause of the phenomenon, is the assemblage of all its conditions. There is no doubt a tendency, which our first example, that of death from taking a particular food, sufficiently illustrates to associate the idea of causation with the proximate antecedent *event*, rather than with any of the antecedent states or permanent facts which may happen also to be conditions of the phenomenon, the reason being that the event not only exists but begins to exist immediately previous, while the other conditions may have pre-existed for any indefinite time: *Ibid*, pp. 199, 200.

The subject then, it appears, is somewhat difficult to deal with at law, and while philosophers treat the whole of the antecedents which determine the result as the cause, man-

kind generally give the name of cause "to almost any one of the conditions arbitrarily selected," or "whose share in the matter is superficially the most conspicuous, or whose requisiteness to the production of the effect we happen to be insisting upon at the moment," and it cannot be quite easy to deal with it either by the reasoning of the highly educated classes, nor yet by that of the ordinary class of mankind.

It appears also that the want of a guard or of a sufficient one at the place of the accident, although a negative matter, the mere absence of a preventing or counteracting cause, may properly, in the actual business of life, although not so in the schools, be taken as a cause in and by itself. Just as the sentry who was off his post would be liable to be shot, although he was only the negative cause of the disaster.

The cases will shew that the circumstance, phenomenon, or event, in the like order of sequence towards or relation to a particular result, is not always selected as the actionable cause, but that sometimes the event immediately preceding the effect is taken, and at other times some event before that.

It is like the instance of the stone thrown into water, stated in the work already quoted from, p. 199. It may popularly be said to reach the bottom by reason of the earth's attraction, or by its exceeding the water in specific gravity.

The three principal events here are the fright of the horse, the backing of the horse and waggon, or the horse becoming unmanageable, and the absence of a fence, or the going of the waggon over the bank.

The plaintiffs say the proximate cause of injury was the want of a fence. The defendants say it was the ungovernable conduct of the horse, no matter how it was produced, whether by accident, misfortune, or otherwise.

The following cases shew that a cause which is not the next preceding event to the loss, damage, or effect, has been considered to be the proximate cause.

In *Burrows v. The March Gas and Coke Company*, 39 L. J. Ex. 33, the plaintiff agreed with the defendants to

supply him with a service pipe from their main to his metre. The service pipe leaked. The plaintiff employed a gas-fitter to lay down pipes from the metre over his premises; the gas-fitter negligently took a lighted candle to search for the leak; an explosion took place which damaged the plaintiff's property. It was held the plaintiff was not answerable for the gas-fitter's negligence, as the gas-fitter was an independent workman, and so the plaintiff did not contribute to the accident, and that the injury arose from the defective service pipe which had before been laid by the defendants, as well as from the gas-fitter's negligence; and that both the gas-fitter and the defendants were answerable to the plaintiff. The defective pipe was said to be the proximate cause of mischief in the suit against the Gas Company, and it follows from the gas-fitter being also liable that the proximate cause, so far as he was concerned, was his act of negligence in using the lighted candle. The defective pipe was the primary, but not strictly the proximate cause—that is, the next immediate event before the explosion. But the Court determined in that action that the proximate cause of injury, as against the defendants, was the defective service pipe.

In *Stanley v. The Western Insurance Co.*, L. R. 3 Ex. 71, the defendants by their policy were to be liable for gas explosions. A fire took place on the premises, an explosion of gas followed from the fire, and it was held that the proximate cause of the loss was not the explosion but the fire.

The primary cause was no doubt the fire, but the explosion was the next immediate, direct, and in that sense the proximate cause of the loss, but the decision was not that way.

In *Hill v. New River Co.*, 9 B. & S. 303, the defendants caused water to spout up in the highway and left it unfenced. The plaintiff's horses were frightened at it, and swerved and fell into an unfenced excavation in the highway made by a contractor who was constructing a sewer. Held, that the proximate cause of injury was the act of the water company.

There are a great many cases expressly on the same point, to which I can do no more than refer: *Harrison v. The Great Northern R. W. Co.*, 33 L. J. Ex. 266; *Smith v. The London and South Western R. W. Co.*, L. R. 5 C. P. 98, affirmed, L. R. 6 C. P. 14; *Lee v. Riley*, 18 C. B. N. S. 722; *Flower v. Adam*, 2 Taunt. 314; *Illidge v. Goodwin*, 5 C. & P. 190; *Montoya v. The London Assurance Co.*, 6 Ex. 451; *The Lords, Bailiffs, and Jurats of Romney Marsh v. The Corporation of the Trinity House*, 39 L. J. Ex. 163; *Sneesby v. The Lancashire & Yorkshire R. W. Co.*, L. R. 9 Q. B. 263; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

The following are cases in which the immediate preceding event has been held to be the proximate cause.

In *Atkinson v. The Newcastle, & Gateshead Waterworks Co.*, L. R. 6 Ex. 404, the plaintiff proceeded against the defendants because they had not kept their pipes charged at all times with water at a certain pressure, for the use of all persons, for the extinguishing of fires, according to their act of incorporation, and the plaintiff's premises took fire and were destroyed from the want of water. And it was held that the proximate cause of the loss was the want of water (a negative matter) and not the fire.

In *Green v. Elmslie*, 1 Peake N. P. C. 212, a vessel was driven by a storm on an enemy's coast and there captured, and the proximate cause of the loss was held to be the capture, and not the perils of the sea.

In *Marsden v. The City and County Assurance Co.*, L. R. 1 C. P. 232, the plaintiff had a policy on plate glass windows, against loss or damage from any cause whatever, excepting fire, breakage during removal, alteration, or repair of the premises. A fire broke out in the adjoining house and slightly damaged the rear of the plaintiff's shop, but it did not approach where the plate glass was.

The plaintiff assisted by his neighbours was removing his stock, &c., to a place of safety. A mob attracted by the fire tore down the plaintiff's shutters and broke the plate glass windows for the purpose of plunder. And it was held the

proximate cause was the lawless act of the mob and not the fire, and that the plaintiff was entitled to recover. See also *Scholes v. North London R. W. Co.*, 21 L. T. N. S. 835.

In *Everett v. The London Assurance*, 19 C. B. N. S. 126, the plaintiff claimed for a loss by fire. An explosion of a powder magazine took place, and the disturbance it caused in the atmosphere in the plaintiff's premises, more than half a mile away, did him damage. And it was held the proximate cause was the explosion or concussion from it, and not the fire.

The other cases on the same point are: *Thompson v. Hopper*, 6 E. & B. 172, E. B. & E. 1038; *Tatham v. Hodgson*, 6 T. R. 656; *Ionides v. The Universal Marine Ins. Co.*, 14 C. B. N. S. 259; *Hahn v. Corbett*, 2 Bing. 205; *Wadham v. Marlow*, 1 H. Bl. 439, note.

In *Atkinson v. The Newcastle & Gateshead Water Works Co.*, L. R. 6 Ex. 404, before mentioned, it will be observed there were two proximate causes, one as against the defendants for not keeping a proper supply of water, and the other would have been against the insurance company, in respect of the fire, if there had been a policy against fire.

So also in *Illidge v. Goodwin*, 5 C. & P. 190, there was one cause of action against the defendant for carelessly leaving his horse unwatched in the street, the other against the person who wantonly whipped the horse and really caused the mischief.

So also in *Sneesby v. The Lancashire & Yorkshire R. W. Co.*, L. R. 9 Q. B. 263, for the defendants' negligence in sending their trucks along the line and dispersing the cattle, and also for their want of fencing, if they had been obliged to fence as against the plaintiff.

The same also in *Burrows v. The March Gas and Coke Co.*, 39 L. J. Ex. 33, before mentioned; and probably there are many other cases of the like nature.

In the following cases the cause of action was held to be too remote.

In *Walker v. Goe*, 3 H. & N. 395, affirmed in Ex. Ch. 4 H. & N. 350, the plaintiff's barge was detained in the canal

by a lock falling in from want of repair. The canal was vested in commissioners by statute. They leased the canal. The lessee by statute was to keep the canal in repair, and if he did not, the commissioners might give him a notice to repair, and if he failed on the notice to do so, they might do it for him and charge him with the expense; and it was held that the not repairing was not the natural proximate result of the want of notice, for if the notice had been given the lessee might still not have made the repairs.

The following cases are to the same effect: *Barber v. Lesiter*, 7 C. B. N. S. 275; *Boyce v. Bayliffe*, 1 Camp. 58; *In re United Service Co., Johnston's claim*, L. R. 6 Ch. 212; *Sharp v. Powell*, L. R. 7 C. P. 253; *Swan v. The North British Australasian Co., Limited*, in Ex. Ch., 2 H. & C. 175; *Burton v. Pinkerton*, L. R. 2 Ex. 340; *Hoey v. Felton*, 11 C. B. N. S. 142; *Ward v. Weeks*, 7 Bing. 211; *Parkins v. Scott*, 1 H. & C. 153.

The case of *Scott v. Sheppard*, 2 W. Bl. 892, 3 Wils. 403, 1 Sm. L. C. 417, was decided upon more grounds than one. The defendant wrongfully first threw the squib; Willes, to prevent injury to him, threw it off as it lighted near him, and Ryal did the same; the last throwing by Ryal did the injury to the plaintiff. The action was trespass and assault. It was held that the original throwing by the defendant was the direct and immediate cause of damage to the plaintiff; the throwing by the other two in self defence was but a continuation of the defendant's act.

It was also said that the defendant was liable "be the injury mediate or immediate," because he was a wrongdoer.

And there are several cases which shew that a wrongdoer is liable for all damages,—not, however, all supposable damages,—which follow from his act, whether they be the direct or indirect result of his conduct: *Vandenburgh v. Truax*, 4 Denio 464; *Smith v. The London & South Western R. W. Co.*, L. R. 5 C. P. 98, affirmed, L. R. 6 C. P. 14, and *Lee v. Riley*, 18 C. B. N. S. 722.

On a consideration of these cases I come to the conclusion that the proximate cause of damage as against the defendants was the defective state of the highway.

If some one had wrongfully whipped or frightened the horse, so that the damage had followed from it, that wrongdoer would have been liable, either because the proximate cause as against him would have been his improperly whipping or frightening the horse, or because being a wrongdoer he would be liable for all the consequences which resulted from his act, whether the damage was direct or indirect.

In that case there would have been two grounds of proximate damage, and the parties in fault could each be proceeded against for his own particular act of wrong.

There are not however two separate parties here, each concurring to the damage.

There is the one party only, as the horse was frightened not wilfully by any one, but from mere accident, and the defendants I think are directly liable for the injury which was done, because it did happen by reason of the defective state of the road, and that was the direct, immediate, and proximate cause of the damage.

If the result had been brought about by the misconduct or negligence of the driver, the proximate cause in my opinion would still have been the defective state of the road. I cannot see how its position can be affected by any antecedent events whatever; but the plaintiff could not have recovered because it would have been the driver's own mismanagement which contributed and led to the accident. The different events must be looked at in such a case, for if the claimant for damages be shown to have produced a particular state of things by his own act or neglect, he cannot blame any one for the consequences which have reasonably followed from it; he has been the author of his own misfortune and injury: *Adams v. The Lancashire & Yorkshire R. W. Co.*, L. R. 4 C. P. 739.

As a recovery could have been had both against the person who wantonly whipped the horse and made it unmanageable and against the defendants, because both were wrongdoers, so no recovery can be had against the defendants when the driver produces the mischief by his own misconduct, because he and the defendants are both wrongdoers in causing the result and are in law equally culpable.

If therefore the plaintiffs are entitled to have and maintain

their action against the defendants, because the state of the road or bridge was the proximate cause of the injury, or would have been so in certain cases, as if the bridge had given way from decay while the plaintiffs were travelling over it, are they precluded from maintaining it because the horse, by reason of the fright, became unmanageable and backed the waggon over the bank ?

Several American decisions were cited on the argument for the purpose of shewing that the rule in some of their states or courts is, "that to maintain an action of the kind the plaintiff must prove that he has sustained an injury by means of a defect in the highway while he was himself using due care : " *Davis v. The Inhabitants of Dudley*, 4 Allen 557. And it is considered the plaintiff did not use due care if the horse from any cause whatever became uncontrollable, and while it was in that condition the accident happened by reason of a defective highway, however defective the highway may have been. *Ibid.*

In the case just referred to the facts were : a bolt of the sleigh broke, which frightened the horse, the horse got detached from the sleigh and ran away until it came upon the obstruction in the highway and broke its leg. The Judge said, at p. 558, "The horse, after breaking away from the sleigh and the control of the driver, was not the subject of any care whatever up to and at the moment when his leg was broken. It is the plaintiff's misfortune that by the imperfection of the bolt, which was attributable to no inattention or negligence of his own, an accident occurred, by means of which his horse was separated from him, so that it was impossible for him afterwards to manage or take any care of the animal. And, therefore, he can maintain no action * * because he is unable to prove a material fact essential to his legal right to recover."

And, again, he says, at p. 558, "It is now perfectly well settled that to maintain an action of this kind, it is incumbent upon the plaintiff to prove that he sustained an injury * * by means of a defect in the highway while he was himself using due care."

And, again, on p. 560, "The effect of the accident

as a procuring cause was complete, when the horse * * * * became detached from the sleigh, and had escaped from the control of the driver. The blind violence of the animal, acting without guidance or direction, became, in the course and order of incidents which ensued, the supervening and proximate cause of the injury by his running against the wood pile, which constituted an unlawful obstruction and defect in the highway. In this succession of events, it happened that the accident placed the owner in a situation where it was out of his power to exercise care over his horse while this new cause was in operation, and until it had contributed to produce the disaster by which its leg was broken."

I have quoted this at length because it is a case which is referred to in most of the other decisions.

In *Titus v. The Inhabitants of Northbridge*, 97 Mass. 258, the horse did not run away, but would not obey the reins, and so went over an unprotected bank, a few feet in descent, the top of which was below the level of the highway, and the whole of which bank was in the highway. There it was said the plaintiff, having lost the control of his horse, could not recover unless it appeared the accident "would equally have occurred if the horse had not been so uncontrollable." p. 266.

This case does not therefore go to the full extent of *Davis v. The Inhabitants of Dudley*.

The case of *Horton v. The City of Taunton*, 97 Mass. 266, in the note, is very like the present one, for there the horse was frightened while on a bridge and backed several rods to an unprotected embankment on the road, and there precipitated the waggon and the plaintiff over the bank; and it was held the plaintiff could not recover.

The Court said, in *Titus v. Inhabitants of Northbridge*, at p. 265, "The driver's control over the horse was as effectually lost in this case as in that,"—(*Davis v. The Inhabitants of Dudley*)—"and in both cases, the action of the horse after he became uncontrollable occasioned the injury."

In *Marble v. The City of Worcester*, 4 Gray 395, the defect in the highway frightened the horses and they ran away,

and after running fifty rods they ran against the plaintiff in the highway and injured him, and it was held the plaintiff could not recover. The Chief Justice was of opinion there was too great a difference both in distance and in causation to make the defect in the highway the proximate cause of the plaintiff's injury.

I cannot say the case is very well reasoned. The objection as to the distance it appears to me is fully answered by the Chief Justice himself as he proceeds in his judgment.

Mr. Justice Thomas, who dissented, said, at p. 409, "In determining what is the true cause of a given result, where two or more causes seem to conspire, the reasonable enquiry, I submit, is not which is the nearest in place or time, but whether one is not the efficient procuring cause, and the other but incidental. We are to seek the efficient, predominating cause, and not merely that which was in activity at the consummation of the accident or loss."

The other American cases on the subject are: *Smith v. Smith*, 2 Pick. 621; *Hyatt v. The Trustees of the Village of Rondout*, 44 Barb. 385; *Cobb v. The Inhabitants of Standish*, 14 Maine 198; *Sykes v. Town of Pawlet*, 5 Am. R. 295; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Sparhawk v. The City of Salem*, 1 Allen 30.

In the case of *Palmer v. Inhabitants of Andover*, 2 Cush. 600, where the bolt of a carriage broke, the horse got free from the carriage on a descent, the carriage by its own momentum ran down the hill and over an embankment on the road, where there was not sufficient railing, and injury was done; and it was held the body liable for defects of highway was answerable for the damage done.

That case is got rid of in *Davis v. The Inhabitants of Dudley*, by saying the injury was from the momentum of the carriage, and that during the whole time up to the happening of the accident the plaintiff was using due care on the road.

The due care was that the carriage by its momentum ran off with the people in it, and was so uncontrollable that it could not be stopped and ran over a bank.

What difference there is between the due care of a runaway

horse and of a runaway carriage, or between the momentum of the one and the momentum of the other, in law, I do not know.

Upon these cases it is contended by the defendants, in addition to their contention that the uncontrollable horse was the proximate cause of injury, which we have disposed of, that because the horse became by fright and accident, and from no fault of the driver, unmanageable, the plaintiffs cannot recover, inasmuch as they were contributory to their own wrong, and were not using the road at the time of the accident with due care ; and that the defendants were not bound to repair or maintain roads or bridges against runaway or unmanageable horses.

It may be quite true that a bridge or culvert need not be constructed with that degree of strength to stand the weight and violence of a runaway team of horses with a heavy waggon, but it is very plain, although horses and conveyances are required to cross a bridge on the walk, that the bridge must for the public safety be made stronger than will just permit the horse or team to go over on the walk. How much stronger must depend on circumstances.

In my opinion the road or bridge must be reasonably safe for the public use, and if it be not so, the fact that the horse was running away or unmanageable will not prevent the person injured from recovering for the damage he has sustained.

It would not be reasonable to hold a municipality liable if a drove of cattle rushed on to a bridge and pressed off the railings, or by their weight and violence shook it or broke it, and it fell, and many of them were injured and killed.

The bridge could not have been intended to meet such an occurrence, any more than it could have been intended to bear a heavy steam carriage or a long train of artillery. But it would be quite unreasonable to hold that it would be a sufficient answer—however crazy the bridge, or however scandalous the state of the road was which caused the injury—that the horse was unmanageable, although from no fault of the driver, at the time of the accident.

The fact of the horse by accident becoming unruly is by this mode of reasoning looked upon as a wrong done by the

owner to somebody or anybody. It is not pretended he is liable to a person whom the horse might accidentally injure. He is not a wrongdoer to that extent, but it is said he is a wrongdoer so as to be precluded from any recovery against the municipality by reason of his participation in the injury which has been done.

He is not, I conceive, a wrongdoer at all upon or by the happening of such an event. And the municipality, which is a wrongdoer has no one on the like footing as themselves, no wrongdoer, to share in the injury with them; and participation, speaking generally, confers no cause of action, but destroys it: *Marfell v. South Wales R. W. Co.*, 8 C. B. N. S. 525, is expressly in point, and *Head v. Tattersall*, L.R. 7 Ex. 7, has some application to it also.

That the plaintiffs were not using the road at the time with due care rests on the like unsound basis and insupportable doctrine. The plaintiffs were using the road with due care. They are not responsible for accidents of the kind. They do not lose all right to be protected because they have been so unfortunate as to be thrown from their carriage by no fault of their own, and against which accident they could not guard; and wrongdoers, such as a municipality who have roads or bridges dangerous to the public, are not to rest their immunity upon the disaster of the persons who have been injured from unavoidable accident, and from no fault or failure on their part.

It seems strange to me that an admitted culpable neglect can be excused when, and I might almost say because, the other party is no way in fault, or that the municipality can set up as a condonation of their own wrong the misfortune of another who has suffered involuntarily injury at their hands.

But for the defective state of the road the damage now complained of would never have happened, and there is in this case no other culpable act to which it can be attributed.

And the defendants who were in default should not be allowed to say to the plaintiffs, who were not in fault, that the injury was caused by the plaintiffs' loss of control of the horse, and not by their own defective road.

On all the legal grounds I am of opinion the plaintiffs are entitled to recover.

See also the case of *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, and particularly the language of Blackburn, J., at pp. 595, 597.

As to the damages, I think they are very large. They are three times what they were on the first trial (a), and there should be an abatement of them, or a new trial granted for that cause.

We all agree the damages should be reduced to \$1,000 for the female plaintiff, and \$250 for her husband.

If this be assented to by the plaintiffs, the defendants' rule will be discharged.

If it be not. the rule will be absolute for a new trial upon payment of costs.

RICHARDS, C. J.—I have had an opportunity of perusing the exhaustive judgment of my brother Wilson, and I concur in the conclusion at which he has arrived, though I have not fully made up my mind as to all the points touched upon by him.

The ground on which I think the defendants are liable is, that the bridge or railing were not in such a state as might reasonably be expected, and the public had a right to demand, considering the circumstances of the defendants and the nature of the highway.

If the township had only been recently settled, the population sparse, and the highway but recently opened and but seldom travelled, it would not be reasonable to expect as complete and well appointed a bridge as in a thickly peopled township and in a public highway much used (b).

Bridges, high embankments, and places where the roads pass in the vicinity of deep and dangerous precipices, may reasonably be expected to have parapets or railings, or some similar means to prevent accidents; and when the amount of travel is great, and the municipality may be supposed to

(a) See *Toms et ux. v. Corporation of Whitby*, 32 U. C. R. 249.

(b) See *O'Connor v. Townships of Otonabee and Douro*, ante, p. 73.

be wealthy, it is only right that they should be compelled to supply these means of preventing accidents.

It is well known that most animals, particularly horses, when passing over bridges or high embankments, or near to precipices, are easily alarmed, and it is necessary to prevent accidents that railings or guards should be constructed for that purpose.

I do not mean to say that every bridge must have a stone parapet on each side, so constructed that horses cannot get over it; but that a railing or guard, reasonable and proper as to size, height, and strength, considering the place where it is situate, and the circumstances of the municipality and use of the bridge, should be placed on the bridge.

These defendants are one of the wealthiest and most populous townships in the Province, and the road is one of the main and much travelled roads leading through the township. If the railing which was on the bridge had been kept in proper state, and had been of the proper length, it is probable the accident would not have happened.

There was evidence given that the pathmaster had been notified of the dangerous state of the bridge, and of its not being in a proper state at the time of the accident.

The jury have negatived by their finding that the plaintiff's wife, or the boy who was with her, were guilty of any negligence or want of care in driving, so the question in the end must be one for the consideration of the jury.

The mere fact that the horse was restive and broke the waggon, or was for the time being not under the control of the driver, cannot relieve the defendants from their responsibility. One of the very objects of the guards to a bridge is to prevent just such accidents, and when they occur and injury is sustained in consequence of the omission of the corporation to keep the bridge in a reasonably proper state of repair, I fail to see how they can free themselves from liability unless they can shew that the party complaining has been guilty of want of reasonable skill or care in driving. The mere fact that the horse *shied*, as it is termed, does not imply want of care or skill in driving, and it must be a

fact for the jury to determine whether there was such want of care or skill.

The case has already gone twice before a jury, and verdicts have twice been found in favor of the plaintiffs. I do not think we ought to grant a new trial on the ground that we would be better satisfied with a verdict for the defendants; but the damages seem large, they are very much more than they were on the former trial. The defendants might, if they had thought proper, have waived their right to a new trial, and have had the law of the case settled on the application for a new trial, in which the rule was made absolute, and this too after the law had been changed so that the plaintiff's wife was enabled beyond all doubt to become a witness.

The defendants having put the admission of the wife's evidence as a ground for a new trial, they obtained it, and I do not think we ought now to make the plaintiffs lose the costs of the second trial, which the defendants need not have taken or pressed for on the ground on which the Court were obliged to grant it (a).

I think, therefore, that the plaintiffs ought not to be in a worse position than they would have been if the first verdict had been allowed to stand.

If the plaintiffs are willing to reduce the verdict on the first count to \$1,000, and on the second to \$250, then the rule for a new trial will be discharged; if not, absolute on payment of costs.

MORRISON, J.—In this case, I am not satisfied that the cause of the accident is attributable to want of a parapet or railing to the bridge.

It seems to me that it was owing to the horses becoming unmanageable, and being beyond the control of the plaintiff's wife.

I wish to guard myself from deciding that if a horse becoming restive or unmanageable, and runs or backs into a

(a) See *Toms et ux. v. Corporation of Whitby*, 32 U. C. R. 249.

ditch or down a declivity or embankment on a highway, that the municipality is therefore accountable for the consequences, or that they are bound to fence or guard all such places against the possibility of a vicious, baulky, or runaway horse, running or backing over the highway at such points.

I am rather inclined to adopt the view taken by the Court in the case of *Moore v. Abbott*, 32 Maine, 46, the municipal law of the State of Maine being similar to ours, that an injury cannot be determined to be occasioned by a defect in the way, so long as it remains certain that some other cause contributed to produce the injury.

However, I do not feel at present strong enough in my opinion to dissent from the judgment of the majority of the Court.

If the plaintiff is entitled to a verdict, I quite concur that the damages are excessive.

Rule discharged (a).

(a) The plaintiffs having agreed to accept a verdict for \$1,000, on the first count, and \$360 on the second count, in accordance with the suggestion of the Court, the rule was discharged. The defendants have appealed to the Court of Error and Appeal.

THE ONTARIO SALT CO. V. LARKIN.

Carriage of goods by water—Mistake by master in delivery—Liability of owner—Vessel chartered for the trip.

One H. had chartered a schooner from Goderich to Chicago, and not being able to fill her, told the plaintiffs' agent they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and this agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington, & Quincy R. R., Chicago. It had also P. & Co.'s brand on the barrels. There was about 2,400 barrels of salt on board besides, consigned to H. On the voyage, about 300 barrels of the deck load, not being a part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H. being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs got only 610 barrels.

Held, 1. That the owner of the vessel, and not H., was her owner for the trip, and the contractor with the plaintiffs.

2. That if the master delivered the salt on the dock as H.'s salt, when it was in fact the plaintiffs', the defendant would be answerable: that there was some evidence of his having done so; and that a verdict for the plaintiffs, therefore should not be disturbed (*a*).

DECLARATION. First count: that the plaintiff delivered to the defendant 1,000 barrels of salt to be shipped on his schooner *Emerald*, to be carried from Goderich to Chicago, and there delivered for the plaintiffs to A. H. Powell & Co., to the care of the Chicago, Burlington, and Quincey R. W. Co., certain perils, &c., excepted, for freight to be paid by the plaintiffs to the defendant; that the defendant was not prevented from delivering the salt by the perils, &c., yet the defendant did not safely and securely carry and deliver the salt, and the same was during the voyage lost to the plaintiffs.

Second count: to the same effect.

Third: trover for salt.

Plea 1. To the first and second counts: that the salt was not the plaintiffs'.

2. To the first count: that the defendant did not promise as alleged.

(*a*) This case has since been affirmed in appeal on the 15th March, 1875.

1. To the first and second counts: that the plaintiffs did not deliver to defendant, nor did defendant receive from the plaintiffs the goods for the purpose and on the terms alleged.

4. To the first and second counts: that the defendant was prevented from delivering the goods by the perils, &c., excepted.

5. To the first and second counts: that the goods formed part of the deck load, and by the terms of the bill of lading they were to be carried at the sole risk of the plaintiffs, and the same were thrown overboard, lost and abandoned by the dangers and accidents of the sea and navigation.

6. To the third count: not guilty.

7. To the first count: that the defendant did safely carry and deliver the goods according to the terms alleged.

8. To the second count: that the defendant did safely carry and deliver the goods according to the terms alleged.

Issue.

The cause was tried at the last Spring Assizes, at Goderich, before Morrison, J., without a jury.

The following is the substance of the evidence which was given:—

John Kay, said: I lived here, (Goderich), in November, 1872. I was plaintiffs' manager then. I know the defendant's schooner *Emerald*. I know Powell & Co. of Kansas City. The plaintiffs' salt was consigned to them, to go by rail from Chicago. I shipped the 1,000 barrels of plaintiffs' salt mentioned in the bill of lading. There were altogether 3,500 barrels of salt on board. The plaintiffs' salt was fine; 70 barrels of it were dairy salt. I told the captain the plaintiffs' salt was the only salt to go to Kansas City, and I would require a bill of lading to that effect. He said there was no difficulty about that. Nearly all the 1,000 barrels were put under the fore-hatch. There were 28 or 30 barrels on deck. There were about 300 or 400 barrels of all kinds on deck.

Cross-examination: I made the bargain with D. G. Holland for it. He said I could send by the *Emerald*,

paying the same rate as he did; that he had chartered the whole vessel for that trip, and I might send 1,000 barrels. Nothing was said as to how it was to be loaded, whether under hatches or on deck. The person who had the dock there shipped it for the plaintiffs; he acted as agent for the plaintiffs in the matter. I saw Holland about four or five months ago here, and he told me he had got all his salt shipped in the *Emerald*. A proposal was made for an adjustment of the loss among the shippers; it was not done. We got a notice of the protest of the jettison of the salt. Holland admitted he had got his salt made up out of ours. It was understood the *Emerald* was to leave the salt at the dock of the Chicago, Burlington, and Quincy railroad, and to Mr. Cook, the agent of the railway company.

Re-examination: I spoke to the captain after I saw Mr. Holland about taking the salt. I was willing to settle on a general average.

There was evidence given then to shew the storm, and the necessity to lighten the vessel by throwing some of the cargo overboard; and that it was the deck load only that was thrown over.

The rest of the evidence was taken under commission:—

T. W. Cooke said: I was the agent of the railroad company, the freight agent. I believe a portion of the salt was consigned to W. H. Powell & Co., of Kansas City. Six hundred and ten barrels were received and forwarded, consigned to W. H. Powell & Co., Kansas City. I paid the lake freight to the captain of the *Emerald* on the 610 barrels for W. H. Powell & Co. The captain told me, on the arrival of the schooner, that a portion of W. H. Powell & Co.'s salt was on deck, and about 300 barrels of it had been washed overboard, and that a portion of the cargo had been jettisoned; for that reason I made no demand on him for the balance of the salt. I made no demand on Haskin, Martin & Wheeler for the balance of the salt. (Haines, who was in their employment, was the person employed by the witness to receive the salt at Chicago and to load it on the cars there). The salt was not handed

over on the dock or slip, when landed, by the carrier to the consignee.

Cross-examination: I did not know D. G. Holland in the matter at all, nor did he act for the company in any capacity. The railway company received the salt from the captain of the *Emerald*. The portion forwarded to W. H. Powell & Co. was received from the rail of the vessel, directly into the cars, by being rolled on a plank. I believe the balance of the cargo was delivered to Haskins, Martin & Wheeler in or near the salt shed, which is on the same dock.

E. R. Haines said: I was shipping clerk for Haskins, Martin & Wheeler. About 2,400 barrels of salt came, consigned to D. G. Holland, and 1,000 barrels to W. H. Powell & Co., Kansas City. There were 1,431 barrels that Haskins, Martin & Wheeler took charge of. I can't say to whom they were consigned, nor how branded, except that some of it had the brand of W. H. Powell & Co., Kansas City; somewhere from 200 to 300 barrels which were claimed by D. G. Holland as his salt, although marked with the "W. H. P. & Co. Kansas City brand." He directed the disposition of it; 1,431 barrels of the consignment to Holland were delivered to Hoskins, Martin & Wheeler, and the balance, about 1,000 barrels of coarse salt, went to Murphy & Co.

Cross-examination: I don't think Holland acted as agent of the railway company, he acted as our agent; he sorted the salt and directed which way it should go. The balance of the salt marked W. H. P. & Co., Kansas City, after the 610 barrels of it were put on the cars, Holland directed to be put into Haskin, Martin & Wheeler's pile.

John Costello: I was foreman of the salt dock, and was employed by Haskins, Martin & Wheeler when the *Emerald* arrived. The schooner discharged at the docks of the railway company. The salt sheds of Haskins, Martin & Wheeler were convenient thereto. Part of the 1,431 barrels taken possession of by Haskins, Martin & Wheeler (between 200 and 300 barrels) were marked W. H. Powell & Co., Kansas City. D. G. Holland appeared

to have all to say about the cargo. I know nothing of the delivery excepting of the 1,431 barrels.

C. B. Throop, Inspector of Customs at Chicago, said: The salt was delivered on the rail of the vessel. Holland claimed to own 2,515 barrels of the salt, and he made the customs entry of it. I cannot say whether cargoes are delivered or handed over to the consignees by the carrier. 2,515 barrels were delivered to Holland, and 610 barrels to the railway company, which was all the salt on board, excepting eight barrels which the captain claimed as ship stores.

There were separate bills of lading for the salt; one was for the plaintiffs' 1,000 barrels. It was signed by John Kay, the plaintiffs' agent, and headed 1000 bbls. salt—M. K.—W. H. Powell & Co., Kansas City. The cargo was "to be delivered at the port of destination * * * unto the consignee mentioned in the margin, or their assigns." In the margin was "Messrs. W. H. Powell & Co., Chicago. Chicago, Burlington, and Quincey Railroad, Chicago."

The learned Judge was of opinion the agreement to carry the plaintiffs' salt in the *Emerald* was made between Holland, who had chartered the vessel, and Kay, the plaintiffs' agent: that the salt was to be delivered to the railway company at their dock at Chicago: that the plaintiffs' salt all arrived at Chicago, and was landed from the vessel at the railway dock there: that the agent of the railway company employed one Haines to receive the salt and load it into the cars of the railway company: that, of the plaintiffs' salt, only 610 barrels were sent by rail to Powell & Co., Kansas City; that D. G. Holland directed the distribution of the salt carried by the vessel and delivered at Chicago, but by or under what authority did not appear. There was no bill of lading signed by the captain.

The learned Judge found for the plaintiffs for \$476 damages, and reserved leave to the defendant to move.

In Easter Term last, *R. P. Stephens* obtained a rule calling on the plaintiffs to shew cause why the verdict

should not be set aside and a nonsuit entered, on the ground that there was no agreement or contract entered into between the defendant and the plaintiffs, as alleged—that the contract was shewn by the evidence to have been entered into by and between the plaintiff and one D. G. Holland, who was the charterer of the vessel for the trip, and was in law the owner of the vessel for that trip; or why a verdict should not be entered for the defendant on the leave reserved, and upon the ground that a delivery of the cargo as per bill of lading was proved, and also that the contract, if any, was performed; or why a new trial should not be granted, upon the ground that the verdict is contrary to law and evidence and the weight of evidence.

In this term *S. Richards*, Q. C., shewed cause. The defendant is liable in this action. Kay, the plaintiffs' agent, with the assent of Holland, who had chartered the vessel for the trip, loaded his salt on board and made a bargain with the captain of the vessel respecting the salt; and the freight for the plaintiffs was paid to the captain. Holland had not sufficient to load the vessel himself, and if he had failed to give a full load he would have been answerable in damages. He was very glad, therefore, that the plaintiffs should help to complete the load. The master said he would give a bill of lading; he did not give it, but Kay, the plaintiffs' agent, gave it for the plaintiffs. The captain did not give one to Holland either, but his, (Holland's), agent gave it. It will be contended for the defendant that because Holland engaged the whole vessel, the defendant is not answerable to the plaintiffs, but that Holland is, who it will be said was the owner for that trip. But the mere fact that Holland bargained to freight the whole ship will not make him stand in the place of the owner. Holland had no control over the master or those on board; he contracted only to have his goods carried, and in such case he has nothing to do with the vessel: *Abbott on Shipping*, 37. The deficiency claimed by the plaintiffs is right. Their load was all under hatches,

and none of what was below deck was thrown overboard. It was the deck load alone which was lost, and these were the barrels of Holland, and the deck load was at the risk of the owner of it. The whole of the plaintiffs' salt was loaded at Chicago. The master appropriated the salt between the plaintiffs and Holland, and he gave to Holland a number of the plaintiffs' barrels equal to the number which was thrown overboard; so that Holland got his full number of barrels, while the plaintiffs' was 390 short.

James A. Miller supported the rule. There was no contract whatever between the plaintiffs and defendant. The plaintiffs bargained only with Holland. The defendant knew nothing of the plaintiffs; he had chartered his vessel for the trip wholly to Holland. It was proved that the custom at Chicago was to consider a perfect delivery made from the vessel when the goods were hoisted to the rail; from that time they were in the hands of the consignee. Haines, the agent of the consignees for both Holland and the plaintiffs, got the salt at Chicago, and it was after that that the plaintiffs' salt was misapplied, not by the master, for he had nothing further to do with it, but by Holland, who actively interfered in the distribution of the salt; and he, if anybody, is the person liable. The defendant, if he were at any time liable to the plaintiffs for the delivery of the salt at Chicago, performed his duty; for he did carry it safely and securely, and duly delivered it at its destination. He referred to *Petrocochino v. Bott*, L. R. 9 C. P. 355.

WILSON, J., delivered the judgment of the Court.

According to the law, the owner of the vessel for the trip was, in my opinion, the defendant and not Holland. The latter had contracted simply for the carriage of his goods.

He never contracted to carry the plaintiffs' goods. He would not have been answerable for their negligent loss or injury on the voyage, nor for the insufficiency of the vessel

to carry a cargo of that kind, by reason of her unseaworthiness; nor for damage done by a collision. He has, in fact, nothing to do with the ship but to have his own goods carried.

In fact we are of opinion the contract by the plaintiffs' agent was made with the master, but with Holland's assent, who was no doubt very glad to have the plaintiffs complete the cargo which he could not fully furnish; and it is more a question of fact than of law: *Dean v. Hogg*, 10 Bing. 345; *Fenton v. The City of Dublin Steam Packet Co.*, 8 A. & E. 835.

Then, as to the delivery. The salt was landed on the dock at Chicago, as provided for.

The salt was in fact carried under the document or bill of lading, or whatever it may be called, which the plaintiffs' agent, who shipped the salt, attached his name to, but which the master did not sign.

It provided for the salt being delivered to "W. H. Powell & Co., Chicago; care of Chicago, Burlington, and Quincey Railway Company, Chicago;" and at the foot of it the master has given his receipt for the freight as received from Mr. Cooke, the plaintiffs' agent, on the 610 barrels.

Mr. Cooke was the proper person, being the agent of the railway company, to receive the salt. The captain told him it was the plaintiffs' salt that had been *washed* overboard, as the witness states it, and that a portion had been jettisoned, and for that reason Mr. Cooke said he made no demand on the master for the balance of the plaintiffs' salt. The railway company received the salt from the captain. The portion forwarded to Powell & Co. was received from the rail of the vessel directly into the cars by being rolled on a plank. He believed the balance of the cargo was delivered to Haskins, Martin & Wheeler on the dock.

From Haines's evidence it appeared he got Holland's salt. Holland claimed 200 or 300 barrels of salt marked with Powell & Co.'s name; he directed the disposition of

it, and directed the balance (being all but 610 barrels) of it to be put into his own lot. He took the contract from Mr. Cooke to receive from the ship and load on the cars the salt marked Powell & Co.

Haines received all the salt on board at the rail of the vessel. As to what he put on the cars under Mr. Cooke's direction, he acted as in Cooke's employ, and was paid specially for it; as to all the rest, he being then in the service of Haskins, Martin & Wheeler, he acted for them, and they represented Holland.

Cooke, as the railway agent, through Haines, whom he engaged for the plaintiffs, allowed Holland to take the salt marked Powell & Co. and consigned to the care of the railway company, as the plaintiffs' salt, and allowed him to distribute and dispose of it as he directed. Cooke, or Haines for him, did not know in fact that the salt which Holland claimed as his, marked Powell & Co., was not his, because the captain said it was the plaintiffs' salt which had been cast overboard, and because Holland claimed it as his property.

The master was to blame in telling Cooke, the railway agent, that it was the plaintiffs' salt which had been lost.

In that he might have been mistaken only. If he were acting in concert with Holland to deprive the plaintiffs of their salt, the defendant would certainly be liable.

I am not sure the master did not deliver all the salt he was bound to do, and that Holland is alone to blame in law for the loss of the plaintiffs' salt.

If the master delivered the salt at the rail or on the dock as Holland's salt, when it was in fact the plaintiffs' salt, the defendant would be answerable; and I cannot say there is not some evidence of it, for the master said it was the plaintiffs' salt that had been thrown overboard, and all the plaintiffs' salt, that is, as I understand, all that was delivered as his salt, was rolled direct from the rail of the ship or dock, or delivered into the cars for Kansas City.

Where it was Holland directed the distribution of it is not stated, and if it were while it was being delivered over

by the master, the master should not have suffered it; it was his place to distribute it, that is, to lay the goods down for the proper party or to him, that is, to say for whom they were delivered; and not to allow Holland to do it for him, and, as Holland did it wrongly, the master is liable.

Holland did just as he liked, and was allowed to do it, although dealing with another person's property, and it rather appears helped himself first, that is, made up his quantity and gave the rest to the plaintiffs.

We think, on the whole, the verdict found for the plaintiffs should not be disturbed. There is a good deal to be reasonably inferred in its favour, and as the defendant has not successfully impeached it, the rule should be discharged.

Rule discharged (a).

(a) This judgment has since been affirmed in appeal.

BROWN V. BLACKWELL.

Action for distraining when no rent due—Lease, construction of—Equitable defence—Not guilty by Statute—Reformation of lease—Administration of Justice Act, 1873.

Defendant on the 2nd September, 1872, leased land to the plaintiff for five years from the 1st October, 1872, at the yearly rent of \$230, payable "on the first day of October of each year, in each and every year," during the continuance of the term, "the first payment of \$200 to be made on the 31st December, 1872, in advance, the balance of said year's rent, amounting to \$30, to be paid at the same time that the payment for 1873 is to be made." In an action against the defendant for distraining on the 9th October, 1873, for the second year's rent, defendant pleaded the general issue by Statute.

Held, that such rent was not payable in advance.

Evidence was tendered that the instructions to draw the lease, and the agreement of both parties, was that the rent should be paid in advance.

Held, there being no equitable plea, that such evidence was properly rejected; and that an equitable defence is not admissible under the general issue by Statute.

Held, also, that under the Administration of Justice Act, 1873, defendant could have pleaded an equitable plea setting out the facts relied on for altering the lease, in accordance with the agreement of the parties; and a verdict for the plaintiff, was set aside on payment of costs, to enable him to do so.

Remarks as to the hardship of the Statute allowing double damages for distraining when no rent due, when the landlord has acted upon an erroneous construction of a doubtful lease.

ACTION by tenant against landlord.

Declaration: first count, in trover; second count, for distraining when no rent was due; third count, for distraining on beasts of the plough; fourth count, for not selling for the best price; fifth count, for selling without appraisement; sixth count, for excessive distress.

Pleas—1. To first count, not guilty; 2. To the other counts, not guilty by statute, 51 Hen. III. ch. 4; 52 Hen. III. ch. 4; 2 W. & M. sess. 1, ch. 5, secs. 2, 5; 11 Geo. II. ch. 19, secs. 19, 21.

Issue.

The cause was tried at the last Spring Assizes, at London, before Morrison, J.

The only facts which are material are the following: The defendant, by deed dated 2nd September, 1872, leased to the plaintiff the easterly sixty acres of lot three, in the second concession of the township of Biddulph, for five years from the 1st of October, 1872, at the yearly rent of

\$230, payable on the first day of October of each year, in each and every year during the continuance of the term:—"the first payment of \$200 to be made on the 31st of December, 1872, in advance, the balance of said year's rent, amounting to \$30, to be paid at the same time that the payment for 1873 is to be made."

Evidence was tendered that the instructions to draw the lease, and the agreement of both parties, were that the rent was to be paid in advance. This evidence was rejected.

The first year's rent was paid up entirely on the 2nd October, 1873.

On the 9th of October, 1873, the plaintiff tendered to the defendant the second year's rent, which was in question in this case, because he thought it was due, and he feared the defendant would distrain for it. The defendant refused to take it. The plaintiff handed it to the defendant's wife, who counted it, and said there were \$20 short.

The defendant counted it. The plaintiff said he counted it, and it was all right. He handed it back to her, but she would not take it. The same day the bailiff seized.

The defendant's counsel contended the second year's rent was payable in advance.

The learned Judge ruled against him; and the jury found for the plaintiff, and assessed the double value of the goods seized at \$1,000.

In Easter term, *Hugh McMahon* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, because of the rejection of evidence tendered at the trial for the defendant to shew that under the agreement between the parties the rent in the lease was payable in advance every year after the first year; and through the mistake of one Charles Procter, who drew the lease, the legal meaning of the provision in it respecting the rent was different from what was intended by the parties; and also on the ground of misdirection, in the learned Judge telling the jury that under the lease the rent for the second year was not payable until the first of October, 1874.

In this term, *F. Osler* shewed cause. The rent was not payable in advance; and the evidence offered to alter it, and to shew that it should have been made so, was inadmissible: *Shier v. Shier*, 22 C. P. 147; *Crawford v. The Western Assurance Co.*, 23 C. P. 365, 370. This matter was in the nature of an equitable defence; and there was no such defence pleaded. Such a defence must begin expressly with the words, "and by way of equitable defence." The general issue *by statute* cannot enable it to be used as an equitable defence without a notice that a merely equitable defence is to be set up. A defence of that kind has been set up at law, but not where the instrument is a continuing one. Where it is fully determined, it does not require to be reformed in fact, and a Court of Law can deal then as equitably between the parties as the Court of Chancery can do: *Wake v. Harrop*, 1 H. & C. 202; *Abrey v. Crux*, L. R. 5 C. P. 37, 41; *Lawrence v. Walmsley*, 12 C. B. N. S. 799; *Borrowman v. Rossel*, 16 C. B. N. S. 58; *Woodfall's L. & T.* 10th ed. 976.

McMahon supported the rule. Such a defence may be given under the general issue by statute, which permits every kind of defence to be entered into and every matter to be shewn which can be a defence. Both parties understood the rent was to be paid in advance. The plaintiff's tender of it in advance shews that conclusively: *Wood v. Dwarries*, 11 Ex. 493. It was only when he was advised the lease did not make it payable in advance in fact, he refused to pay it. The learned Judge refused to hear the evidence, because he said the instrument should be first reformed. The evidence was rejected, not because there was not a plea, but because no plea could then be added, or be of any use till after the lease was actually reformed in equity. The plea should now be added and a new trial granted. *Shier v. Shier* was before the Act of 1873. He referred to *Druiff v. Lord Parker*, L. R. 5 Eq. 131; *Rogers v. Hadley*, 2 H. & C. 227.

WILSON, J., delivered the judgment of the Court.

We agree with the ruling of the learned Judge at the trial,

firstly, that the second year's rent, now in dispute, was not payable in advance; and, secondly, that he could not receive parol testimony of what the real contract of the parties was in that respect; but, thirdly, that the instrument, if the facts be as stated, need not actually be first reformed before effect can be given to them.

On the first point, I have considered whether, as \$200 of the first year's rent was payable in December, 1872, in advance,—and as the *reddendum* is to pay “on the first of October of each year, in each and every year,” whether that did not make the second year's rent due in October, 1873; otherwise there would be no rent payable between December, 1872, and October, 1874, passing over altogether the October of 1873; and so there could not be rent payable “of each year in each and every year;” but I cannot construe the lease in that way.

The *reddendum* is to pay the yearly rent on the first of October of each year in each and every year. That would, without more, have made the first year's rent fall due in October, 1873, and the second year's rent in October, 1874.

But a special arrangement was made as to \$200 of the first year's rent which was made to fall due in December, 1872, *in advance*.

If it had been made payable in December, 1872, it is possible, in order to make the rent fall due of each year in each and every year, that the second year's rent might have been held to be payable in October, 1873.

But the first year's rent has not been made payable in December, 1872, as postponing the payment from October, 1872, but expressly *in advance* of the payment which would otherwise have been due in October, 1873. And these words, “*in advance*,” operate against the lessor rather than for him, by shewing that the \$200 of the first year's rent was an exceptional payment, and was made in advance, and so all argument is excluded of the second year's rent being payable in October, 1873, if any argument could have been raised and effect given, in the manner suggested, to the words, on the first of October “of each year in each and every year.”

On the second point, it is quite plain the lease could not be contradicted as it stood. It should have been either changed to what it was said it should have been made in the first instance, or a plea was necessary to authorize the reception of the evidence.

The defendant's counsel did not ask leave to add a plea, and without a plea the evidence was properly rejected.

It was not stated at the trial that the evidence was admissible under the general issue by statute. And if it had been it would not have been sustainable. "The special matter" under such a plea, is to be given in evidence under it.

But there are two reasons why that form of plea should not apply to an equitable defence: firstly, because the statute requires an equitable plea shall begin by stating that it is pleaded by way of equitable defence; and, secondly, because an equitable plea must be tried by the Judge without a jury, and without a notice that the defence intended to be set up is equitable, either by its expressly stating that fact or by a reference to the statute relating to equitable defences in the margin, the Judge cannot know by what mode of trial the issue is to be determined

I am of opinion the noting of the statute in the margin will not entitle the party to set up any merely equitable matter.

The C. L. P. Act, sec. 124, requires the party pleading equitably "to plead the facts which entitle him to such relief by way of defence." See also Administration of Justice Act 1873, sec. 3. That is for the information and guidance of the Court, which is as well as for the guidance of the jury who are not to try the equitable facts.

The 11 Geo. I., ch. 30, sec. 43, permitted certain insurance companies to plead in actions against them on their policies what was equivalent to the general issue; and see *McSwiney v. The Royal Exchange Ins. Co.*, 14 Q. B. 634, and *Carr v. The Corporation of the Royal Exchange Ins. Co.*, 1 B. & S. 956, where the general form of plea was used.

As to the third point, I think the defendant could under the Administration of Justice Act, 1873, sec. 3, have pleaded an equitable plea setting out the facts on which he

relies for altering the effect of the lease, and making it according to the actual agreement of the parties.

The cases of *Shier v. Shier*, 22 C. P. 147 ; and *Crawford v. The Western Assurance Co.*, 23 C. P. 365, we think were well decided under the former general law governing equitable defences.

The Act of 1873 was in force when this action was commenced.

The 3rd section provides, that, "Any party to an action at law may, by plea or any subsequent pleading, set up facts which entitle him to relief upon equitable grounds *although such facts may not entitle such party to an absolute, perpetual, and unconditional injunction in a Court of Equity, and although the opposite party may be entitled to some substantive relief as against the party setting up such facts* ; and such plea or other subsequent pleading shall begin with a statement that it is on equitable grounds,"

The Courts of Law and Equity are to be auxiliary to one another as far as possible for the more speedy, convenient, and inexpensive administration of justice in every case: sec. 1.

And by sections 8 and 9 it is provided that "for causing complete and final justice to be done in all matters in question in any action at law" the Court or Judge may "pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require."

And if the Court or Judge cannot deal with the equitable question raised "so as to do complete justice between the parties, or it may for any other reason be more conveniently dealt with in Chancery," the matter may be transferred to Chancery.

Under the previous law as to equitable defences the Courts of Law would not entertain an equitable defence unless the ordinary common law judgment for the defendant, which was the only one the Court had to give "that the plaintiff take nothing by his writ, and that the defendant do go thereof without day," could be pronounced, and when the Court could do complete and final justice between the parties. The Court could not entertain the defence when the defendant, besides getting the

relief which he asked, would be directed to do some act, because at law the Court could not pronounce such a decree, nor carry it out or enforce it if it were pronounced; *Wodehouse v. Farebrother*, 5 E. & B. 277.

When the contract is ended, and nothing further is to be done upon it than is in controversy at law, it does not require to be actually reformed, and the Court of Law will entertain an equitable plea setting up such facts which would entitle him in equity to have it reformed; *Borrowman v. Rossel*, 16 C. B. N. S. 58.

The Act of 1873 relieves us from the difficulty under which the parties laboured in getting the benefit at law equivalent to the reformation of an existing continuing contract.

There has been felt a strong desire to extend this equitable relief in actions at law: *Wodehouse v. Farebrother*, 5 E. & B. 277; *Druiff v. Lord Parker*, L. R. 5 Eq. 131. And the Legislature has by the Act of 1873, conferred it.

The remedy at law is in some respects more extensive than it was in equity in the like cases, for at law on a defence of mistake appearing by an equitable plea the Court of Law may give relief in the same suit, while the rule formerly in equity was that the defendant claiming relief in a similar case was obliged to proceed by way of cross bill: *Jacobs v. Richards*, 18 Beav. 300; *Graham v. Ackroyd*, 10 Hare 192.

Where the lessor meant to make the lease just as it was expressed, but he did not know the legal effect of the provision, the Court would not interfere; it was considered there was no mistake at all: *Powell v. Smith*, L. R. 14 Eq. 85.

In the present case, the mistake is said to have been in not drawing the lease according to the agreement of the parties, which is different from the preceding case.

As a rule, the mistake must be shewn to have been the mistake of both parties, or must be otherwise clearly proved to have been a mistake. That the defendant undertakes to establish,—but it is not very certain he can do so. The parol evidence may be very direct. The statement in the lease that the \$200, part of the first year's rent, was expressly stated to be *in advance*, is a strong argument that if it

had to be so specially provided for, it was not intended that the other rents should be paid in advance.

The defendant should have an opportunity of pleading such a defence, and the plaintiff may test it by demurrer, whether it is a sufficient answer at law,—either at common law or in equity,—or it may be tried on the facts as to its truth.

If it be held that the relief claimed can legally be granted, and if the right to it be established by evidence, we shall be able to give effect to it by our judgment, order or decree. The lease itself will not be actually altered or reformed in the body of it. The judgment pronounced to that effect, if pronounced, and the endorsation of it on the lease, will adequately answer the purpose: *In re De la Touche's settlement*, L. R. 10 Eq. 599; *White v. White*, L. R. 15 Eq. 247.

As to relief in such a case, I may refer also to *Beauchamp v. Winn*, L. R. 6 H. L. 223.

The result is, that the verdict will be set aside, not on any of the grounds taken against the ruling at the trial, but on the merits, to let in the equitable defence, if it can be made available, which we do the more readily because the damages, \$1,000, double the value of the goods distrained, are, under the circumstances, an enormous compensation on the one side, and punishment on the other, which it is high time the Legislature remedied. The single damages, with the costs of the suit, are a sufficient punishment to the landlord, if he is in the wrong, even wilfully, and a sufficient compensation to the tenant. But the misfortune is, there is no difference made between the landlord who abuses his power, and the landlord who is honestly, but mistakenly, acting under what he conceives to be the construction or which he is advised is the construction of the lease, and about which the Judges themselves may be divided in opinion. Yet in such a case the landlord, because he knew only as much as, and no better than, the Judges who agree with him in his reading of the lease, must pay the double damages, just in like manner as if he had wantonly and oppressively abused his power of distress to harass and ruin the tenant.

The rule will be absolute on payment of costs by the defendant.

Rule absolute.

Re WM. TYRELL AND THE CORPORATION OF THE COUNTY OF YORK.

High school districts—Power to change the limits of—34 Vic. ch. 33, sec. 40, O.

Under the 34 Vic. ch. 33, O., the County Council has impliedly the power, from time to time, to change the limits of a High School District, and not merely to do so once, or when an additional school is established.

IN Michaelmas Term, *Harrison*, Q. C., obtained a rule calling on the County of York to shew cause why by-law No. 233 of the Corporation should not be quashed, with costs, on the ground that the Corporation of the County having determined the limits of High School District No. 1 of the County according to by-law No. 204, had no power to alter or vary the same, or to repeal the by-law No. 204; and on grounds disclosed in the affidavits and papers filed.

By-law 204 was passed on the 23rd June, 1871. It was entitled: "A by-law to divide the County of York into High School Districts, and to determine the limits thereof; also for the appointment of a High School Board for each district." It referred to the 34 Vic. ch. 33, O.

By sec. 1 of that by-law the County of York was divided into four high school districts for the purposes of the Act; District No. 1 to be composed of the Township of Etobicoke, all that portion of York Township west of Yonge street, the first concession of York east of Yonge street, and the Village of Yorkville; Districts Nos. 3 & 4, were also described.

Sec. 2 provided for the persons who were to be trustees, and sec. 3 applied \$600 to these schools.

By-law No. 233 was passed on the 18th June, 1873. It is entitled "A by-law to define and to determine the limits of the high school districts in the County of York.

It recited the 34 Vic. ch. 33, O. By sec. 1 of this by-law, it was enacted "that portion of the County of York, that is to say, the municipality of the Township of York, and the incorporated Villages of Newmarket, Richmond Hill, and Markham, be divided into four high school districts for the purposes of the Act." By sec. 2, District No. 1 was to consist of the municipality of the Township of York.

Secs. 3, 4, and 5 apply respectively to districts 2, 3, and 4 under this by-law. By sec. 6, by-law No. 204, as far as it related to the above, was thereby repealed.

By-law No. 239 was passed on the 25th June, 1873. It enacted that by-law No. 233 should not take effect in so far as referred to contracts entered into by the different High School Boards for the maintenance of high schools, until on and after the 25th of December, 1873.

In Hilary Term, *J. K. Kerr* shewed cause, By-law No. 233 was passed under secs. 36 and 40 of the 34 Vic. ch. 33, O., and it is contended by the applicant that a by-law, No. 204, having been passed, the purposes of the Act have been fulfilled, and there was no longer any power in the County Council to legislate on the subject. The other legislative provisions are, the Consol. Stat. U. C. ch. 63, secs. 1, 2, and 3, and the 29 Vic. ch. 23, amending the same. By-law No. 204 did not define the limits of the district. All it did was to continue the then existing Grammar School divisions—to maintain the then school districts. The power to define the limits carries with it the power to alter and determine again the limits of the different districts, or any of them. By-law 233 repealed 204, and re-appointed the area into four districts.

The power of the Council was not exhausted by the passing of by-law 204. The County had still power to pass by-law No. 233. The County, having the power to make a by-law, had the power expressly to alter or repeal it: The Interpretation Act, sec. 6, sub-sec. 30, O.

Harrison, Q. C., supported the rule. By-law No. 204 divided the County of York into four high school districts.

The districts were formed before the passing of the 34 Vic. ch. 33, O. The By-law 204 was passed after the statute defined the different districts. That power having been exercised, the County had no power to make any alterations of or in the district, and they could not, therefore, pass by-law 233, which, in effect, repeals 204 and re-enacts something new and different from what had already been done under No. 204: *Trippet v. Eyre*, 2 Ventr. 113, 3 Lev. 263. The 40th sec. of the Act requires that every County Council *shall determine* the limits of each high school district, &c.: that is, shall determine it once for all, not do so from time to time, but make a finality of it: *Cooley* on Const. Lim., 2nd ed., p. 116-125 and 191; *Dillon's Mun. Corp.*, 2nd ed., 245. The Legislature has given no power to the County to provide for the effect of contracts and liabilities entered into by the districts in case they are changed, and it is not likely that such a provision would have been omitted if the power of change had ever been contemplated. Careful provision is made in that respect in the case of a separate school being formed: Consol. Stat. U. C. ch. 65, sec. 8; and in changes in municipal connections: 36 Vic. ch. 48, -secs. 15, 25. It was held that the power to renew a writ was only to renew it once: *Neilson v. Jarvis*, 13 C. P. 176; *Miller v. The Beaver Mutual Fire Insurance Association*, 14 C. P. 399. In consequence of such decision, the 27 Vic. ch. 13, sec. 2, was passed, and power was thereby given to renew from time to time; but that is just what is wanting here. The Interpretation Act does not apply, because there is an intention shewn by the 34 Vic. ch. 33, sec. 40, O., not to give the County the power to do more than they can effect by a single Act of legislation.

WILSON, J., delivered the judgment of the Court.

The Grammar Schools under Consol. Stat. U. C. ch. 63, as amended by the 29 Vic. ch. 23, were to be designated and known, by the 34 Vic. ch. 33, O., as High Schools.

By the consolidated statute there was to be one or were to be more than one Grammar School in each county.

By sec. 3, all Grammar Schools—besides the senior Grammar School in a town—established before 1854 were to be continued to be held at the places where they were then held; but the Board of Trustees, by a resolution to be approved by the Governor in Council, might change the place of holding the school, and if established since the 1st of January, 1854, the place of holding it might be changed by the County Council.

By sec. 17 the County may establish additional Grammar Schools subject to the fund paying the senior school \$400, and all other schools \$200 each, and the new one \$300. See Amending Act, 29 Vic. ch. 23, sec. 8.

By sec. 16, "The Municipal Council of each county, township, city, town, and incorporated village may from time to time levy and collect by assessment such sums as it judges expedient, to purchase the sites of, to rent, build, repair, furnish, warm and keep in order, Grammar School houses and their appendages, grounds, and enclosures, * * and for providing the salary of the teachers, * * and all sums so collected shall be paid over to the Treasurer of the County Grammar School for which the assessment is made.

The new Act applies to Grammar Schools, by sections 34 to 40, both inclusive.

The 40th section declares that, "Every County Council shall determine the limits of each High School District for each Grammar School now existing within the county, and may form the whole or part of one or more townships, towns and villages within its jurisdiction, into a High School District * * Provided, however, that existing Grammar School divisions already established shall be called High School Districts, and continue as such till otherwise altered by by-law of the County Council."

By sec. 35, as far as the fund will permit the Lieutenant Governor in Council may authorize the establishment of additional High Schools upon the conditions prescribed in the Grammar School Act and this Act.

By the 47 Geo. III., ch. 6, there was to be one District Public School, afterwards made Grammar Schools by 2 Vic.

ch. 10, sec. 1. By the 16 Vic. ch. 186, provision is made for there being more than one Grammar School for the county, and by sec. 14 the County Councils were empowered to establish additional grammar schools.

These Grammar Schools were all County Grammar Schools, and they were not by name distinguishable one from the other until 16 Vic., ch. 186, sec. 12, provided that each County Grammar School should have prefixed to the word *county* the name of the city, town, or village in which it was situated.

Until the 34 Vic. ch. 33, O., these Grammar Schools had no defined limits within the county. By sec. 40 of that Act the County Council "shall determine the limits of each High School District for each Grammar School now existing. Provided that existing Grammar School Divisions already established shall be called High School Districts, and continue as such till otherwise altered by by-law of such County Council."

But by the Consol. Stat. ch. 63, sec. 16, Grammar Schools acquired a species of locality, although of no very definite form, when the councils of every city, town, and incorporated village in the county were authorized to levy and collect whatever money they required to purchase and build, &c., Grammar School Houses, &c.

There is nothing in the section authorizing the County Council to determine the limits of each High School District for each Grammar School now existing, which makes the act of determination, when once made, either final or the contrary.

If there had been no power to establish such additional schools, it is possible the power conferred to determine the limits, when once exercised, would be considered as ended and exhausted, because the purpose of the enactment would have been fulfilled, but we by no means say that would be so.

But as by sec. 17 of the Consolidated Act, and by sec. 35 of the Act of 1871, the County Council may (now,) with the consent of the Lieutenant Governor in Council, authorize the establishment of additional High Schools, it seems

to follow as a consequence, if these additional School Districts are to be defined in their limits, of which the Act says nothing, that the Act should be read, if it be possible to do it, so as to enable provision to be made for the additional school by assigning to it certain limits, which will almost of necessity require a rectification of the limits of the other districts.

The fact that at and before the passing of that Act there were many School Districts *already established*, which were not to be altered until it was done by by-law of the County Council, shews that the Legislature desired that the districts established should continue, but that they might nevertheless be altered by the County.

The fact that the County was to determine the limits of all then existing Districts, shews that the Legislature desired each District should be defined.

The fact that new High Schools may be established shews they should properly, although that is not declared by the Act, have determined limits assigned to them.

And the fact that the assigning these limits may require the rectification of the other districts, shews that the power to determine the limits of *now existing* School Districts, and the power to alter all *already established* Districts, may be read as evidence, coupled with the general provision of the Interpretation Act, that the County Council has the power to repeal a by-law determining the limits of School Districts, and to determine other limits for them by a new by-law, in lieu of the former limits.

The County Council is a continuing and interested body in these schools. They must provide yearly a sum, equal to one half of that which is paid by the Government. They may establish additional schools, and they are to appoint the six duly qualified persons who are to be members of the High School Board. They can scarcely be considered as persons whose powers are to be judged of as if they were filling the temporary place of arbitrators.

We think, upon the whole, that the statute does impliedly confer the power upon the County Council to change the limits which have been assigned to or for a particular dis-

trict, and to do so generally and not only at such times as an additional school is established.

The rule will be discharged with costs.

Rule discharged.

HOLMES V. THE MIDLAND RAILWAY OF CANADA.

R. W. Co.—Fire from locomotive—Negligence in leaving brushwood on their lands—Brushwood fence—Contributory negligence—14 Geo. III. ch. 78.

In an action against a railway company for negligently allowing their land adjoining the track to remain covered with brushwood, &c., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's land, it was shewn that the railway fence, in which the fire originated, was a brush fence, the line having been recently built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under the C. S. C. ch. 66, sec. 4, and he had felled them lengthwise with the track and left them there.

The jury having found for the plaintiff, the Court refused to interfere.

Held, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land.

Held, also, that the 14 Geo. III., ch. 78, afforded no defence.

Quære, whether the defendants, under the circumstances, could have been compelled to put up any other than a brush fence; but if the adjoining land owners are content with such a fence, they cannot complain of it as negligence on the part of the company. In this case, however, the question as to such a fence being "brushwood" within the meaning of the declaration, or as to its being negligence in defendants to have such a fence there, was not raised at the trial.

ACTION for damages to plaintiff's timber, &c., by fire from defendants' railway engine.

It is unnecessary to set out the first and second counts, as the verdict on them was for the defendants.

Third count: that the defendants owned land which separated the railway from the land of the plaintiff: that on the defendants' land there was brushwood, &c., whereon from time to time fell and settled, as the defendants well knew, red-hot cinders and ashes, which escaped from the locomotive in the course of its being pro-

pelled along the railway: and there was thus, as defendants knew, great danger that the brushwood, &c., would be ignited, and that the timber, &c., would be in great danger of being destroyed; and it was the defendants' duty to keep the land owned by them in such a state that fire should not be occasioned by ashes or cinders from the locomotives on the railway: that hot cinders and ashes escaped from the locomotive and fell on the defendants' lands and the brushwood, &c., then so negligently and improperly kept and suffered to be in such an improper state, &c.: and that in consequence the same caught fire, which extended to and destroyed the timber, trees, and fences of the plaintiff.

Plea, general issue, by statutes, 16 Vic. ch. 241, sec. 3, and 14 Geo. III. ch. 78, sec. 86.

The cause was tried before Richards, C. J., at Lindsay, at the Spring Assizes of 1873.

It was proved at the trial that there were brush and stuff, and rubbish, and old logs along the railway, on the track, which were burning. The plaintiff's woods came close up to the railway land. The logs, &c., on the defendants' land appeared to have been left from the chopping for the track. The fire, which occurred in August, was found on the railway property. It had spread over the adjoining property. It appeared to have started in a brush fence along the track, and was seen burning. The fire, burned for more than two weeks, and went over as much as fifty acres of plaintiff's land, and all kinds of timber were burned. The tenant of the cleared land and his sons saw the fire begin, or smoke from it, in the forenoon, and they did not go to it till after dinner. They could not put it out. There was no water to be had at the time. The surface leaf mould was burned off the plaintiff's land. That injury was \$5 an acre. There had been trees cut on the plaintiff's land. The tops and brush were lying there at the time of the fire. The company employed the plaintiff to cut down the trees on his own land that were within one hundred feet of the centre of the track. The trees were left there. They were fallen lengthwise with the

track to keep them off the railway ground. There were fires in the land there before this one.

The defendants' counsel contended there was no duty cast on the company to clear their land: that it was not shewn the engine was not properly constructed or managed: that the plaintiff was guilty of contributory negligence because of the state his land was in: that the plaintiff's tenant also neglected to put the fire out when he first saw it: that the evidence did not shew the fire originated in the rubbish and logs on the track: *McCallum v. The Grand Trunk R. W. Co.*, 31 U. C. R. 527: that the fire was an accidental one, and the defendants were, therefore, not answerable: 14 Geo. III. ch. 78, sec. 86.

Leave was reserved to move on the last ground. The other objections were held to be matters of fact for the jury, or were over-ruled.

The learned Chief Justice told the jury he thought there was no contributory negligence: that the timber which was at the side of the railway was there by the act of the defendants, and they could not cast the responsibility of removing it, to avoid fire, on the plaintiff.

The charge was objected to in that respect.

The verdict was for the plaintiff on the third count, and \$400 damages; and for the defendants on the other counts.

In Easter Term, 1873, *J. R. Cartwright* obtained a rule calling on the plaintiff to shew cause why the verdict for him should not be set aside, and a nonsuit or verdict be entered for the defendants, on the leave reserved; or why a new trial should not be had, on the ground of misdirection, because the learned Chief Justice directed the jury that the plaintiff was not guilty of contributory negligence in leaving his land in as bad or a worse condition than that of the defendants.

In this term, *C. S. Patterson*, Q. C., shewed cause. The adjoining owner of land to a railway is not bound to keep his land in any different way because a railway passes through his land, or beside it, from what he should or

might have done if no railway had been near him : *Smith v. London and South Western R. W. Co.*, L. R. 5 C. P. 98 ; *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, 750. The plaintiff was not bound to anticipate that the defendants would be guilty of negligence : *Radley v. London, and North Western R. W. Co.*, L. R. 9 Ex. 71. As to the Imperial Act, 14 Geo. III, ch. 78, secs. 84, 85, and 86, it is not applicable and it is not in force here : *Dean v. McCarty*, 2 U. C. R. 448 ; *Gaston v. Wald*, 19 U. C. R. 586 ; *Filliter v. Phippard*, 11 Q. B. 347. This point is not argued further, as it is now before the Court of Appeal for decision in *Gillson v. North Grey R. W. Co.*, 33 U. C. R. 128 (a). If the statute be in force here, it does not apply to corporations unless the interpretation act makes it applicable. The fire, too was not accidental within the meaning of 14 Geo. III., ch. 86, sec. 86 : *Filliter v. Phippard*, 11 Q. B. 347.

MacLennan, Q. C., and *Cartwright* supported the rule. There was no negligence in the management of the engine, nor any defect in its construction. The complaint is, that the defendants had rubbish and logs on their ground, into which the fire got, and it spread from there to the plaintiff's land. The road there had been made for only about fourteen months ; it was made through a forest ; and there was waste timber lying about as well on the defendants' land as on the plaintiff's. The plaintiff's land being in that condition, there was contributory negligence on his part. The timber which the defendants had the right to cut on the plaintiff's land, as being within the one hundred feet, they had no right to take away nor to burn, as it was not their property ; the plaintiff should, therefore, have removed it himself. The judgment of Bramwell, B., in *Vaughan v. The Taff Vale R. W. Co.*, 3 H. & C., 750, was expressly overruled in the Ex. Ch. in the same case, 5 H. & N. 679. According to the plaintiff's argument, the defendants will not be liable if the fire began in the plaintiff's land from sparks carried there direct from the engine, so long as it is a pro-

(a) Since affirmed in appeal.

per engine and properly managed; but they will be liable if the sparks fall at the very border of the defendants' land. On the point of contributory negligence, see *Vaughan v. Menlove*, 3 Bing. N. C. 468; *McCallum v. The Grand Trunk R. W. Co.*, 31 U. C. R. 527; *Ohio and Mississippi R. W. Co. v. Shanefelt*, 47 Ill. 497. As to the 14 Geo. III. ch. 78, sec. 86, it does apply to negligent fires: *Filliter v. Phippard*, 11 Q. B. 347; and the case last cited is not a decision that the statute does not apply to accidental fires; it does apply to such fires: *Viscount Canterbury v. The Attorney-General*, 1 Phill. 306. There is no decision that the statute does not apply to cases of negligence. It is in force in the State of New York: *Lansing v. Stone*, 37 Barb. 15. It has been treated as in force in this Province: *Gaston v. Wald*, 19 U. C. R. 586. They referred also to *Hill v. The Ontario, Simcoe, and Huron R. W. Co.*, 12 U. C. R. 503; *Smith v. The London and South Western R. W. Co.*, L. R. 6 C. P. 14.

WILSON, J., delivered the judgment of the Court.

The evidence shews that the defendants' roadway, we mean the land they own between their fences, had a great deal of brush, old logs and other combustible matter lying about; and that there was a brush fence made by the defendants dividing their land from the plaintiff's, along, at and about the place where the fire happened.

Mr. Hopkins, who had the care of this land, said he had a conversation with Mr. Stewart, the engineer of the company, about putting up fences, and he said there was no use, there was so much rubbish about it would take fire and burn them.

Mr. Stewart said he had no recollection of saying so, but that he had always told persons who wanted the company to build new fences, that it would be impossible to save the fences where the farmers were clearing their land; so they put up brush fences only in the meantime.

The fire, it is said, appeared to have started in a brush fence along the track.

If that were so, then, although it is assumed the fence

was not a proper one under the Consol. Stat. C., ch. 66 sec. 13, which requires a fence "of the height and strength of an ordinary division fence;" still, if it were acquiesced in by the plaintiff, the fence would be a proper one for the purposes of this suit. And if the fire *originated in it*, and not in the brush and logs upon the road, the defendants, in the absence of negligence in the management of their fire, and if they were using a properly constructed fire apparatus, would not be liable.

A brush fence may, in some cases, be a sufficient fence, unless a different fence be expressly required to be made, for a railway company to make.

If the road were made through a new country, where nearly all the fences of the settlers, as is often the case, were made of brush, I do not see why a railway might not, at first at any rate, construct brush fences too: *Smith v. London and South Western R. W. Co.*, L. R. 6 C. P. 14, per Blackburn, J., p. 22.

If a brush railway fence were thought to be too dangerous, as likely to catch the sparks from the engine which unavoidably escaped, and to create fires, that might be a reason for condemning them; but so long as the adjacent owners were content with such a fence, they could not, in the case of an accidental fire arising in the fence, make the structure of that fence a cause of complaint and negligence against the company.

How the facts are in this case, on that point, does not appear; and if the fire originated in the fence, the whole case turns upon it.

It must be kept in mind that the object of the fence is only "to keep off hogs, sheep, and cattle, and thereby divide and separate and keep constantly divided and separated such lands from the lands or grounds adjoining thereto." The fence, too, is to be "a post or rail, hedge, ditch, bank or other fence sufficient" for that purpose: Consol. Stat. C., ch. 66, sec. 19. So that the plaintiff, especially in a new country, cannot, perhaps, complain of the brush fence under any circumstances.

The Consol. Stat. C., ch. 66, sec. 134, requires every railway company to cause all cleared land belonging to the company, adjoining the railway, "to be sown or laid down with grass or turf, and cause the same so far as it may be in their power to be covered with grass or turf, and cause all thistles and other noxious weeds * * to be cut down and kept constantly cut down, or to be rooted out." That provision is made in favour of agriculture.

There is no statutory provision in what way railway companies shall otherwise keep and manage their grounds.

They must have them in such a state—considering the dangerous nature of the element they have to use, and the impossibility of preventing the escape of some fire and sparks from their engines, notwithstanding all the appliances which science or experience has yet brought to bear in providing numerous means of precaution, and considering also that the land is their own, and they can do as they please with it—that fire or sparks which do escape without the negligence or blame of the company, will not be likely, and may not reasonably be supposed, to do any harm.

The mere fact that the railway grounds were not in as perfect order as they might have been, and were even to some extent covered with brush or logs, will not alone make the company liable.

The cause of action in such a case is the *negligence* of the company, for keeping their grounds in such a state as to be dangerous, or which they knew would make them dangerous.

In *Vaughan v. The Taff Vale R. W. Co.*, 3 H. & N. 743, in Ex. Ch. 5 H. & N. 679, the second count was just as the third count is in this case, and that charged that the land of the defendants had grass and other combustible matter growing upon it, in which fell and settled, as the defendants well knew, large quantities of red-hot ashes and cinders which escaped from the engines, and that the defendants knew there was great danger of fire from these materials spreading to the plaintiff's premises.

Negligence, then, being the ground and cause of action,

the fact of negligence may be dependent upon several considerations.

Was it negligence that the defendants, at the end of fourteen months after constructing their line, had only a brush fence along their line of roadway ; or that they had not cleared all the brush and old logs from their roadway ; or that they had not removed all the stumps ; or that they had not cut down all the long dry grass or weeds, or bushes that grew upon it ?

There must be some reasonable allowance made to enable new enterprises of the kind to get their road into order, especially in new or wild sections of the country. And more should fairly be exacted from an old company than from a new one.

It is difficult to lay down anything like a rigid rule of law in such a case ; but it is quite easy, if these are proper matters to be taken into consideration in determining the questions of negligence or no negligence, for the judge to submit them to the jury, and for the jury to deal with them in such a way that they will do what is just between the parties.

The case of *Smith v. The London and South Western R. W. Co.*, L. R. 5 C. P. 98, and in the Ex. Ch. L. R. 6 C. P. 14, is important, it appears to me, on this point.

There may have been, or may not have been, negligence according to the state of circumstances adverted to proved at the trial. No objection was taken on that point. That still leaves the question about the brush fence to be dealt with.

If it be *brushwood*, within the meaning of the third count, perhaps there should have been some question left to the jury about it, as to whether there was negligence in the defendants, under all the facts, having *it* there in place of a different kind of fence. That point was not raised at the trial.

If the brushwood *fence* be not within the language of the third count, the defendants should have a new trial, but then the plaintiff should be allowed to amend, and it is

very questionable whether it would be to the defendants' benefit to go to trial again on that point only. The damages are not excessive, for there was substantial injury done, if the plaintiff is entitled to a verdict at all. We do not feel disposed to interfere on either of these matters.

The next question is, whether the plaintiff contributed to his own loss by leaving the trees and brush on his own land, which were cut because they were within six rods from the side of the railway track.

The Consol. Stat. C., ch. 66, sec. 9, sub-sec. 14, gives the company power to fell or remove such trees.

The company employed the plaintiff to fell the timber, which he did, as the witness said, under the directions of the defendants' engineer.

The trees do not belong to the company, because they have the power "to fell or remove" them. If they carried them away and used them, or sold them or cut them into cordwood, or for other purposes, or burned them, they would be liable to the owner for the value.

It is not at all plain that the company is to do more than to fell the trees—that is, for the safety of the cars, goods, and passengers, and servants of the company. The *safety* is secured by *falling* alone. Can the company be made to remove? I very much doubt it. *Remove* is used as an equivalent to or of the word *fell*. Removing them may be by felling.

The plaintiff, at any rate, who actually did the work on his land and was paid for it, did not require the company to do anything more. He did not require the trees or brush to be removed.

Under these facts it is not assuming too much if we say that he assented to the trees and brush being left as they were on his own land, and that he should be responsible for their remaining there, whatever responsibility that may create.

Did the plaintiff then contribute to his own injury by leaving the trees and rubbish lying on his land adjacent to the railway?

If an adjoining proprietor were to sow his field next to the railway with wheat, or other crop which was combustible when it ripened, it could not be said he was contributory to his loss. He must be allowed to use his land after the construction of the railway as he did before it, where the use he is putting it to is not necessarily or inevitably dangerous.

If he were to put up his hay or straw stacks close to the railway ground, when there was no occasion for his doing so, and he could more beneficially and conveniently have put them up elsewhere, it might be held he had acted with so little care for his own interests, that they should not, in case of loss from fire for which the company was liable, be valued at very much, if entitled to be valued at all.

I should think if he were to erect a powder factory close to the railway track it would be considered he had courted his own injury, and was contributory to the loss he had sustained.

It would not be the act of a prudent, and hardly that of a humane or honest man, to place others in jeopardy, and then claim compensation for himself as one deeply wronged.

A person who put up a hay rick on the extremity of his own ground and close to his neighbor's house, and the hay rick ignited of itself and destroyed his neighbor's house, was held liable, because the hay rick was liable to ignite, and it was not the act of a prudent man to put such a thing so close to a neighbor's house: *Vaughan v. Menlove*, 3 Bing. N. C. 468.

I cannot say the plaintiff was to blame for leaving the timber and brush where it was. The fact that it was a new country and that it might have been expensive and inconvenient to him to remove or burn the wood, which is not made obligatory on him to do, must be an argument as serviceable to him as it can be for the defendants.

The learned Chief Justice was certainly not wrong in telling the jury there was no contributory negligence on the part of the plaintiff.

We do not say nor mean to say that the state in which a

man's land is, covered with brush, chips, logs, old stumps, and other combustible matter, can never be taken into consideration by the jury in the measure of damages which such an owner should receive from a neighbour who is necessarily burning his fallow, or from a railway company by reason of a spark from their engine, when he, with his own ground in such a careless, reckless condition, is complaining of the negligence of another. We exclude any such case from our consideration.

The only other question is, what effect the Act 14 Geo. III. ch. 78 has in this case.

Are the defendants excused from liability because of such a fire?

A fire arising from negligence, and communicating from one part of the house to another part, was held to be an accidental fire within the meaning of the Act, and the defendant was therefore not liable: *Gaston v. Wald*, 19 U. C. R. 586.

In *Filliter v. Phippard*, 11 Q. B. 347, it was held that one who set out fire in his close in a careless and negligent manner, and when it was dangerous to do so, and managed it so carelessly that injury happened to the plaintiff, was not within the protection of the statute; that such a fire could not have been said to have begun accidentally; and it is said such a defence would not have been passed over in *Vaughan v. Menlove*, 3 Bing. N. C. 468, if it could have been raised.

In *Vaughan v. The Taff Vale R. W. Co.*, 3 H. & N. 743, 751, the act was held not to apply "where the fire originates in the use of a dangerous instrument, knowingly used by the owner of the land on which the fire breaks out."

In *Smith v. The London and South Western R. W. Co.*, L. R. 5 C. P. 98, and in the Ex. Ch. L. R. 6 C. P. 14, the statute was not even mentioned, and that was a case precisely like the present.

So we can have no difficulty in saying that according to the express decisions of the Queen's Bench and Exchequer in England, and according to the decisions in the Common

Pleas and in the Exchequer Chamber, in cases like or like in principle to this action, the statute was not referred to at all, and undoubtedly it would not have been omitted in these cases if it had been thought possible to claim its benefit.

It does seem strange to call a fire purposely put out in a field, and either negligently put out when it was dangerous to do so, or negligently managed after it was set out, a fire beginning accidentally.

A person is entitled to be guarded against the negligence of others in such a case.

A fire from a railway engine is just the same in principle.

The defendants certainly fail in establishing any rights under that statute.

Upon the whole the rule should be discharged.

Rule discharged.

THE TORONTO STREET RAILWAY COMPANY v. FLEMING.

Toronto Street R. W. Co.—Assessment of.

Held, Morrison, J., dissenting, that under the Assessment Act, 32 Vic. ch. 36, O., the Toronto Street Railway Company was assessable for those portions of the streets occupied by them for the purposes of their railway, as being real estate, within the meaning of sec. 3 of the statute.

SPECIAL CASE.—Replevin by the plaintiffs against the defendant for the taking by the defendant, as bailiff of the Collectors of Taxes in the City of Toronto for the wards of St. Lawrence, St. Patrick, St. Andrew, St. John, and St. James, in a certain building or stable situate on the east side of Jarvis street, in the City of Toronto, as a distress for taxes alleged to be due from the plaintiffs to the defendants, amounting in all to the sum of \$334.62, of certain goods, chattels, and personal property of the plaintiffs, that is to say, one brown horse, &c.

From the facts admitted it appeared :

1. The plaintiffs are the proprietors of the railway known as the Toronto Street Railway, which said rail-

way is situate on Yonge street, Queen street, and King street, in the said City of Toronto. Certain portions of the permanent way or track of the said railway are situate on the public streets in each of the said wards of St. Lawrence, St. Patrick, St. Andrew, St. John, and St. James, in the said City of Toronto.

2. The assessment for the said taxes, in regard to which the said distress was made by the defendant, was made by the said City of Toronto, in respect to the portions of Queen street, Yonge street, and King street, used by the plaintiffs for the purposes of their said railway, under the provisions and statutes and by-law hereinafter referred to.

3. The right and title of the plaintiffs to the said railway, and all the chattels, rights, privileges, franchises, and appurtenances thereunto belonging, or in anywise appertaining, are, and were at the time of the said assessment, held by the plaintiffs by virtue of articles of agreement bearing date the 26th of March, 1861, made between the Corporation of the City of Toronto of the first part, and one Alexander Easton, of the second part; 24 Vic. ch. 83, entitled, "An Act to Incorporate The Toronto Street Railway Company;" a by-law, of the defendants, No. 353, respecting street railways, and authorized by the said statute, and contained in the Consolidated By-Laws of the Corporation, page 290; 32 Vic. ch. 81, O., providing for the sale of the railway; and the sale to William Thomas Keily (who is president of the plaintiffs), of the said railway, &c.; as also certain intermediate conveyances, whereby the said railway became vested in the said William Thomas Keily and one George Washington Keily.

The agreement between Easton and the said City of Toronto recited several resolutions of the city council, which so far as material are as follows:—

First. That Alexander Easton be authorized to lay down street railways of on any of the streets of this city, such railways being of approved construction, and worked under such regulations as may be necessary for

the protection of the citizens. *Second.* All works necessary for constructing and laying down the several railway tracks shall be made in a substantial manner, according to the best modern practice, under the supervision of the City Surveyor or such other officer as the Council shall appoint for this purpose, and to the satisfaction of the Council. *Third.* The roadway between and within at least one foot six inches from and outside of each rail shall be paved or macadamized, and kept constantly in good repair by the said Easton, who shall also be bound to construct and keep in good repair crossings of a similar character to those adopted by the Corporation within the limits aforesaid, at the intersection of every such railway track and cross streets. *Sixth.* The city authorities shall have the right to take up the streets traversed by the rails, either for the purpose of altering the grades thereof, constructing or repairing drains, or for laying down or repairing water or gas pipes, and for all other purposes within the province and privileges of the Corporation, without being liable for any compensation or damage that may be occasioned to the working of the railway, or to the works connected therewith. *Seventeenth.* Should the proprietor neglect to keep the track or the roadway or crossings between and on each side of the rails in good condition, or to have the necessary repairs made therein, the City Surveyor or other proper officer shall give notice thereof, requiring such repairs to be made forthwith, and if not made within a reasonable time, the said Surveyor or other officer as aforesaid shall cause the repairs to be made, and the amount so expended may be recovered against the said proprietors in any court of competent jurisdiction. *Eighthteenth.* The privilege granted by the present agreement shall extend over a period of thirty years from this date, but at the expiration thereof the Corporation may, after giving six months' notice prior to the expiration of the said term of their intention, assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration; and in case the Corporation should

fail in exercising the right of assuming the ownership of the said railway at the expiration of thirty years as aforesaid, the Corporation may, at the expiration of every five years to elapse after the first thirty years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereunto appertaining, after one year's notice, to be given within the twelve months immediately preceding the expiration of every fifth year as aforesaid, and on payment of their value, to be determined by arbitration. *Nineteenth.* Should the proprietors at any time give up the railway or cease to exercise the privilege hereby granted to them for a period of six months, they shall forfeit the entire property, including rails, cars, &c., to the benefit of the Corporation.

The City of Toronto then, by the agreement, which they confirmed by the by-law referred to, gave Easton full power and authority to build and run the road, and use the streets for that purpose; and Easton covenanted to build and run the road, subject to and in accordance with the by-law, agreement, and statutes affecting it.

The by-law also provided for the punishment by fine, not exceeding \$50, of persons interfering with the uses of the road by the railway.

The said assessment was in respect of taxes alleged to have accrued for the year 1873, and was made under the provisions of "The Assessment Act of 1869."

The question for the opinion of the Court was, whether the said property of the plaintiffs in the said wards of the said City of Toronto, or any of them, was under all the circumstances liable to such assessment by the corporation of the the said City of Toronto, it being agreed and admitted by the parties that the plaintiffs had no residence or place of business within the City of Toronto, and that unless the said property of the plaintiffs in the said wards could be assessed as "Real Estate," within the meaning of the said Assessment Act, it could not be assessed by the said corporation of the City of Toronto; and also, that if the said property is so assessable, and said assessment was

legally and properly made, and the said taxes properly imposed, and payable by the said plaintiffs.

The case was argued in Easter Term last.

Harrison, Q. C., for the plaintiffs. 24 Vic. ch. 83, created the plaintiffs a joint stock company, and adopted and ratified the agreement made on the 26th of March, 1861, between the City of Toronto and Alexander Easton. The city passed the by-law No. 353 respecting the street railway in pursuance of the said Act. The 32 Vic. ch. 81, O., and the 36 Vic., ch. 101, relate also to the plaintiffs.

The question is, whether the franchise which the plaintiffs have is real or personal estate in the city, so as to come within the operation of the assessment law. The assessment was made under the 32 Vic. ch. 36, O. Sec. 3 shews what is real estate. Sec. 21 provides who shall be assessed, and how the property shall be described. Sec. 22 provides expressly for the land and other property of incorporated companies. Secs. 24, 25, and 26 refer to the owner and occupant. Sec. 33 applies to railway companies, and Sec. 36 provides that the personal estate of incorporated companies shall be assessed, not against the company, but that each shareholder shall be assessed for the value of his stock or shares in the company. And under none of these provisions does the street railway, a mere track laid in the public streets of the city, come. The company had no exclusive possession of any soil or land, not even of the use of the track or iron rails, and without some such right as that there was no property within the operation of the assessment Act to tax. He referred to, *The Niagara Falls Suspension Bridge Co. v. Gardner*, 29 U. C. R. 194; *West Chester Gas Co. v. The County of Chester*, 30 Penn. 232; *Middlesex R. W. Co. v. The City of Charlestown*, 8 Allen 330; *Appeal of the North Beach and Mission R. W. Co. in the matter of widening Kearney Street*, 32 Cal. 499; *St. Louis v. The Ferry Co.*, 11 Wall. 423; *In re Hatt*, 7 U. C. L. J. 103.

C. R. W. Biggar, contra. The right which the plaintiffs have to use the track is not an easement. They have and use certain portions of the streets for their own special purposes. Such a right as they have is within the 3rd section of the assessment Act. The question properly is, can the city assess as property part of the public streets, if used in the manner in which the plaintiffs use it? The case of *Appeal of the North Beach and Mission R. W. Co., in the matter of widening Kearney Street*, 32 Cal. 499, is an express decision that a street railway company is assessable for the streets which they use in the course of their business. *Rex v. The Governor and Company of the Chelsea Water Works Co.*, 5 B. & Ad. 156; *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263; and *Dillon on Mun. Corp.*, 2nd ed., Sec. 628, shew that the plaintiffs may be assessed as they have been. The plaintiffs pay yearly for a license on each car which they run. The roadway could not be assessed with other land of the company: *The Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168. He referred also to, *Regina v. The Cambridge Gas-light Co.*, 8 A. & E. 73; *Rex v. The Birmingham Gas-light & Coke Co.*, 1 B. & C. 506; *Rex v. The Brighton Gas-light & Coke Co.*, 5 B. & C. 466; *Regina v. The Company of Proprietors of the East London Waterworks*, 18 Q. B. 705; *Regina v. The Churchwardens and Overseers of Mile End Old Town*, 10 Q. B. 208.

Harrison, Q.C., in reply. A highway cannot be assessed, and it is for a highway the company have been assessed, while they have no property or estate in it. He referred further to *Rex v. Jolliffe*, 2 T. R. 90; *Rex v. Bell*, 7 T. R. 598; *Williams v. Jones*, 12 East 346; *Regina v. Leith*, 1 E. & B. 121; *Regina v. Morrison*, 1 E. & B. 150; *Watkins v. The Overseers of Milton-Next-Gravesend*, L. R. 3 Q. B. 350; *Grant v. The Local Board for the District of Oxford*, L. R. 4 Q. B. 9; *Roads v. The Overseers of Trumpington*, L. R. 6 Q. B. 56; *Allan v. Overseers of Liverpool*, L. R. 9 Q. B. 180.

WILSON, J.—By the agreement made with Mr. Easton, it is recited that the city accepted his proposals to construct street railways as contained in certain resolutions passed on the 14th of March, 1861.

They were, so far as is now material:—1. That Easton be authorized to lay down street railways on any of the streets of the city, to be worked under such regulations as should be necessary for the protection of the citizens.

2. The work was to be done under the supervision of the City Surveyor.

3. The roadway between the rails, and for eighteen inches outside of each rail, was to be kept in repair by Easton, and he was to construct crossings.

6. The city shall have the right to take up the rails for altering the grades of the streets, constructing or repairing drains, &c.

17. If the proprietor of the street railway neglect to keep in repair the portion of the road he is to maintain, the city may, after notice, do the repairs and charge him with the expense of it.

18. After thirty years, or at periods of five years thereafter, the city may assume the ownership of the railway, and of all real and personal estate appertaining thereto, on a notice to that effect, and on paying the value to be fixed by arbitration.

19. If the proprietor give up the railway or cease to exercise the privilege for six months granted to him, he is to forfeit the entire property.

Then the city gave and granted to Easton the exclusive right and privilege to construct, maintain and operate street railways, with all necessary turn-outs, side-tracks, and switches on King, Yonge, and Queen streets, together with right to the use of the tracks of the railway as against all other vehicles whatever, to have, hold, and enjoy the rights and privileges thereby granted without any let or hindrance or trouble of or by the city, or any one on their behalf.

Mr. Easton then covenanted to construct, maintain, and

operate the railway, and that all vehicles might travel upon and use the tracks, "provided they do not impede or interfere with the cars running thereon, and subject to Easton at all times having the right to keep the tracks with his cars where meeting or overtaking any other vehicle thereon."

The city, by their by-law, confirmed this agreement.

By the 24 Vic. ch. 83, sec. 5, the plaintiffs were empowered "to use and occupy any and such parts of any of the streets or highways aforesaid, as may be required for the purpose of their railway track, and the laying of the rails and the running of their cars and carriages," with the consent of the city; and the city was "authorized to grant permission to the said company to construct their railway, * * across and along, and to use and occupy the streets or highways, or any part of them, for that purpose."

By the 32 Vic. ch. 81, sec. 1, O., the mortgagee of the company, or any judgment creditor, was authorized to proceed upon his mortgage or execution, against goods, and sell the "railway and all the chattels, rights, privileges, and franchises of the said company." And under such sale the purchaser "shall acquire a good title to the railway, and all the chattels, rights, privileges, franchises, and appurtenances thereto belonging, or in anywise appertaining."

33 Vic. ch. 101, O., uses similar language.

By the 32 Vic., ch. 36, sec. 3, O., " 'Land,' 'real property,' and 'real estate' respectively include all buildings, or other things erected upon or affixed to the land," &c.

The first division is into residents and non-residents. The residents are then rated as owners or occupiers. The owner is supposed to be the freeholder, and is to have the letter F. set opposite his name, and the occupant when not the owner is supposed to be a householder or tenant, and to have the letters H. or T. put opposite his name: secs. 21, 22, 23, 24, 25, and 26.

The plaintiffs, if assessable, should be rated as occupiers, and have the letter T. set opposite their name.

Are they occupiers or tenants of land by reason of their street railway? Gas and water pipes laid in the soil are

ratable: *Regina v. The Company of Proprietors of the East London Water Works*, 18 Q. B. 705; *Rex v. The Company of Proprietors of Rochdale Waterworks*, 1 M. & S. 634; *Rex v. The Birmingham Gas-light and Coke Co.*, 1 B. & C. 506; *Regina v. The Cambridge Gas-light Co.*, 8 A. & E. 73; or telegraph poles laid on the land of another is an occupation and ratable: *Electric Telegraph Co. v. Overseers of the poor of the township of Salford*, 11 Ex. 181. An occupier is one who has *exclusive* possession of the soil in question for some length of time or interest: *Rex v. The Company of Proprietors of the Mersey and Irwell Navigation Co.*, 9 B. & C. 95, 112.

In *Rex v. Jolliffe*, 2 T. R. 90, the defendant got a way-leave from a lessee to carry coals over his leasehold, paying so much per ton. Held, he had only a license, a bare right of passage or easement, and not a grant of the profits of the land, and was not the occupier of the land so as to be ratable.

Buller, J., said, at p. 95: "This is not like the case of a grant of land to be used in a manner incompatible with any other mode of enjoying it; for the defendant has only the liberty of passing over this land for the purpose of carrying his coals, and cannot prevent any other person from using it. And if grass were to grow on this way, the owner of the land would have the right to feed his cattle on it; the easement the defendant has does not affect the right of the owner of the land. Great inconveniences would result from rating every way-leave; for if a neighbour were to give a right of passing over his field merely out of friendship, and no rent were paid for it, such liberty of passage would not be the subject of a rate, because the land can only be rated in the hands of the occupier; but if he were to make an advantage of it, as such it may be rated in his hands."

In *Rex v. Bell*, 7 T. R. 598, the Dean and Chapter of Durham leased the land in question, reserving the right of making and granting ways over the premises, paying reasonable damages to the lessees for the spoil of ground.

The defendants got from the Dean and Chapter a way-leave, and for making, laying, and placing waggon ways, erecting bridges, and levelling hills for a term of years at a yearly rent. The defendants enclosed the ground over which they had the way-leave, and excluded the lessees of the Dean and Chapter and all other persons; and they erected a bridge, and built two houses on it. Held, they were occupiers—that it was of no consequence they had only a way-leave; that their title need not be enquired into, for a disseisor as well as the rightful owner would be an occupier, and subject to be rated as such.

In *Rex v. The Company of Proprietors of the Mersey and Irwell Navigation Co.*, 9 B. & C. 95, the defendants, by Act of Parliament, were authorized to make the rivers Mersey and Irwell navigable, and to maintain the navigation, and for that purpose to clear, enlarge, or straighten the river, and to cut and dig the banks, and to make new cuts for water through adjoining lands, and to build bridges, &c.; and in consideration thereof to take toll. The river was made navigable, and lands were purchased for towing paths and cuts. Held, they were not liable to be rated for land taken for the purpose of the navigation, because they were not occupiers, but had a mere easement in it. Held, also, they were liable to be rated for the new cuts and for the locks, &c., erected on their own land.

Bayley, J., said, at p. 109, “They, (the defendants) have only a qualified right to use the land, to deepen the channel of the river, and make the soil fit for holding the water which water they are afterwards to use; but, subject to the right of navigation vested in them, and subject to the right they have that the soil shall continue to hold the water in which the navigation is to take place, the soil remains in the ownership and occupation of those persons to whom the soil originally belonged;” and he also said, “They can maintain no description of action which an occupier generally is capable of maintaining, * * they had an easement only in the land.”

Park, J., at p. 113, said : The defendants " had only a special power, they had not the exclusive occupation of any part of it. * * The company have no exclusive right to occupy any part of the soil of the bed of the river ; * * they have only an easement in it.

In *Williams v. Jones*, 12 East 346, the defendants had a ferry, and at one side of it they had a post driven into the soil of the highway, to which the boats were made fast. Held, the owner of the ferry had not been found to have any property in the soil of the highway, and if he had been found to have the right to make such especial use of the highway, that did not make him the occupier of the highway, nor give him any exclusive possession of it ; nor could he maintain trespass for any injury done to the soil at the landing places which were common to all the King's subjects.

Where a Water Company had as much interest in the soil of the reservoir as they had in the soil where the pipes were laid in the land of another, it was held they might be rated as occupiers of the reservoir as well as of the soil in which the pipes were, although they had only possession at the will of the Crown ; their possession was exclusive, although for a limited purpose only : *Rex v. The Governor and Company of the Chelsea Waterworks Co.*, 5 B. & Ad. 156.

That the pipes are laid in the public streets does not prevent the Company from being rated for their occupation ; they have for that purpose an exclusive occupation. *Rex v. The Brighton Gas Light and Coke Co.*, 5 B. & C. 466, and other cases are to the same effect,

In England the question turns chiefly on the effect of the words *occupier* and *occupation*, and for that reason one who has a mere *easement* is not liable to be rated, because he is not an occupier of it, for an easement is only a service or convenience which one hath in the land of another without profit, as a way through his land : *Jacob's Law Dict. Easement* ; 3 *Kent's Com.*, 11th ed., 511, 535 ; and the easement cannot be used for any other purposes than that for which

it was granted: *The Durham and Sunderland R. W. Co. v. Walker*, 2 Q. B. 940; *Regina v. Pratt*, 4 E. & B. 860.

The contention in England has always been whether the right or interest which the person rated had was as an occupier or whether he had an easement only.

In *Watkins v. Overseers of Milton-next-Gravesend*, L. R. 3 Q. B. 350, a license only to moor a floating hulk was granted. If there had been an occupancy of the moorings attached to the soil there would have been the occupancy of the soil.

In *Grant v. The Local Board for the District of Oxford*, L. R. 4 Q. B. 9, a post driven into the soil of the Thames and used by the University Boat Club to attach a barge to, without the license of any one, did not create an occupancy of the soil by reason of the post. The boat club was not shewn to have had the exclusive use of it, and any one else might have used it, and exclusive occupation must be the foundation of ratability. See also *Roads v. The Overseers of Trumpington*, L. R. 6 Q. B. 56.

A lodger has not the exclusive possession of his room, nor the charterer of a ship when the owners, master and men are in charge. *Ibid*, per Bramwell, J., page 62; *Dean v Hogg*, 10 Bing. 345.

In *Allan v. The Overseers of Liverpool*, L. R. 9 Q. B. 180, it was held that it is only the exclusive occupier of premises—the person who, if a trespass were committed on them, could bring an action of trespass for it—who can be rated as the occupier. The appellant had the preferential use of the quay, &c., but when he was not using it the board could use it for other purposes, and they could exercise also other rights over it not consistent with an exclusive occupation by the appellant.

The case of *Appeal of the North Beach and Mission R. W. Co. in the matter of widening Kearney street*, 32 Cal. 499. is expressly in point against the plaintiffs. Here the persons, spoken of in the Assessment Act are owners, occupants householders, freeholders, and tenants.

A way is an incorporeal hereditament. The plaintiffs have more than the right of way or a passage. The public in

general have that ; the plaintiffs have more, they have a special easement which others have not, to lay down a railway track, and to maintain it, and to exclude all others from it while they use it. That is a burden on or use of the soil which as against the owner of the freehold they would have no right to put there or exercise. Because the owner of the freehold gave the public a right of passage that could confer no right on the plaintiffs to place a railway there too of their own motion.

They have and they are claiming and exercising a special privilege or easement. They have not the exclusive possession or occupation of the soil which they use, but the question is, is this a thing erected upon or affixed to the land ? If it be, it is *land, real property, or real estate*, within the meaning of the assessment law.

The Statute says nothing of *exclusive* possession, nor do the terms of the Act import or require that there should be an exclusive possession of the soil as against all others.

The plaintiffs have a railway track let into, or upon, or affixed to the land ; they have the right to make a special use of it, and to keep it where it is for a definite period, and to exclude all persons and vehicles from it while they use it.

The fact that others may use it for their vehicles when the plaintiffs are not using it may detract from its value to them, but it cannot the less make the railway track, "things affixed to the land."

The Statute says such things shall be land, and shall be rated. They are placed there not for the public use, but for private gain, just as ordinary railways are built. They are really of as much service to the plaintiffs as the gas pipes and water pipes of such companies laid in the ground are to them, excepting that such companies have the exclusive use of the soil where their pipes are, while the plaintiffs have not the exclusive use of their railway track ; but the Statute says nothing of the exclusive use or possession, nor anything which implies it ; and there is no reason why the plaintiffs should not be assessed for the *real estate* which

they have as railway track, estimated at its value as affected by the rights which others have over it.

It is and must be a very substantial right which the plaintiffs have which is protected by the penalties of fine and imprisonment, as this one is according to the facts of this case.

In my opinion the plaintiffs were rightly rated for the property in question as real estate, and judgment should be entered for the defendants, with costs of suit.

RICHARDS, C. J.—The numerous authorities referred to by my brother Wilson in his judgment shew that in England gas and water companies whose pipes are laid in the public streets, and covered deep in the soil, are ratable under 43 Eliz., ch. 2, sec. 1, as occupiers of the land; and electric telegraph companies are also liable to be rated in respect of their wires and posts placed along the line of a railway company, though the latter might require their removal to a more convenient place. It is a test then whether the companies are ratable under the statute of Elizabeth, if they have the exclusive occupation of land.

The water and gas companies have the exclusive occupation of that portion of the soil in which their pipes are laid, and the telegraph company also exclusively occupied the portion of the land on which the posts stood, and of the air through which their wires were suspended.

It may be urged here that the plaintiffs are not in the exclusive occupation of the land over and through which their rails pass, and therefore what they possess is merely an easement, and cannot be rated as a part of the soil. If the right they possessed was merely to pass over the soil in common with others, then it might be an easement, but they have a right to place the foundation for the rails beneath the soil, and it is imbedded in the soil so that it cannot be removed without disturbing the soil, and this seems to be in their exclusive occupation. No one has a right to disturb or interfere with these portions of what composes their railway. The iron is attached to that, and

though the public may have the limited right to pass on and over that surface when the company is not using it, yet the plaintiffs are the owners of that which is beneath, and cannot legally be disturbed as to its possession any more than the water or gas companies can be disturbed as to the pipes beneath the surface.

It is something of substantial value, and the superstructure of this road, the iron, is placed upon it.

It seems to me they may well be considered in possession of that which is beneath the surface, which was placed there by them, and on which the iron track is laid, and of which no one else is in possession.

In the case referred to of *The Electric Telegraph Co. v. The Overseers of the Poor of the Township of Salford*, 11 Ex. 180, the Court seemed to think that as land included everything under and over the surface of the earth, the telegraph company were occupying a portion of the land, even if their wires were fixed above the surface of the earth. The company were liable if the wires passed through the air instead of land or water.

It seems to me that the suspending of wires over land is more like an easement than the foundation of a street railway let into the land, and forming, in fact, part of it.

Under the sec. 405 of the Municipal Act of 1873, "the soil and freehold of every highway or road, altered, amended, or laid out according to law, shall be vested in Her Majesty."

Under sec. 407 of the same Act, "Every public road, street, bridge, or other highway, in a city, township, town, or incorporated village, shall be vested in the municipality, subject to any rights in the soil which the individuals who laid out such roads, * * reserved."

Under the 9th section of the Assessment Act of 1869, "All land and personal property in the Province of Ontario is liable to taxation," subject to certain exemptions; amongst them, "All property vested in or held by Her Majesty." But when any such property "is occupied by any person otherwise than in an official capacity, the occupant shall

be assessed in respect thereof, but the property itself shall not be liable": sub-secs. 1, 2.

Sub-sec. 6, "Every public road and way, or public square."

Sub-sec. 7, "The property belonging to any county or local municipality * * but not when occupied by any person as a tenant or lessee, or otherwise than as servant or officer of the corporation for the purposes thereof."

By sec. 36, "The personal property of an incorporated company shall not be assessed against the corporation, but each shareholder shall be assessed for the value of the stock or shares held by him, as part of his personal property, unless such stock is exempted by this Act; provided always, that in companies investing their means in gas-works, water-works, plank and gravel roads, manufactories, hotels, railways and tram-roads, harbours, or other works requiring the investment of the whole or principal part of the stock in real estate already assessed for the purpose of carrying on such business, the shareholders shall only be assessed on the income derived from such investment."

The property owned by the plaintiffs, which, it is claimed, is subject to taxation, is something which is affixed to the land, and under the Assessment Act, as well as at common law, is properly termed land; and the Assessment Act says, that all land and personal property shall be liable to taxation, subject to the exemptions.

If the soil and freehold of the land on which the plaintiffs' railway is built be in the Crown, under sec. 405 of the Municipal Act, and that brings it within the first exemption, then if the plaintiffs occupy any portion of it, they can be assessed in respect thereof.

Then, if under the secs. 406, 407 the property is considered as vested in the municipality, the 7th exemption does not extend to the occupation by any person who holds otherwise than as a servant or officer of the corporation for the purposes thereof. As neither of these exemptions appears to cover the case of these plaintiffs, the 6th exemption is the only remaining one which seems to touch it, viz, "Every public road and way, or public square."

In *The Governor and Company of the Chelsea Waterworks Co. v. Bowley*, 17 Q. B. 358, decided in Trinity Term, 1851, Lord Campbell, when giving judgment, considered the right to lay water pipes in land was in the nature of an easement, and neither land nor hereditament. The right was to convey water through the land of another, and whether the water was to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appeared to be immaterial. The company are not the owners of the land where the pipes lie, nor are they tenants of this land.

If this case were alone to be considered, it might be it would be a strong authority to shew that the plaintiffs' interest in the soil was a mere easement, and therefore not liable to be rated as land.

In *Regina v. The Company of Proprietors of the West Middlesex Water Works*, 1 E. & E. 716, decided in vacation after Hilary Term, 1859, at p. 720, Wightman, J., gave the judgment of the Court. He said, "In this case the first question is whether the company are ratable for their mains which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is, *de facto*, in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be ratable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute."

Lord Campbell, Erle and Hill, J. J., appear to have concurred in this judgment.

It seems to me that portion of the land below the surface, which is occupied by the plaintiffs to form the bed on which the rails are laid, must be in their possession quite as much as the mains and water pipes of water and gas com-

panies. The case of *The Electric Telegraph Co., v. The Overseers of the Poor of the Township of Salford*, 11 Ex. 180, is decided on the same principle, and seems to apply here. In that case one of the learned judges puts the case of a building erected in the air, across a street. He said, "Can there be a doubt that, though it was in the air as a house, the land was occupied." Suppose a house so built here, would the occupant escape taxation because every road and way was exempt from taxation? I think not.

It is not the road or way which is taxed, but that portion of the soil of the road which is occupied by the plaintiffs, the same as the mains and pipes of the gas and water companies.

Taking the decided cases as authority binding on us, I think they lead logically to the conclusion that these plaintiffs were liable to have the property taxed, and, under the statute, as land.

I therefore concur in the conclusion at which my brother Wilson has arrived.

MORRISON, J.—During the argument, I was of opinion that the plaintiffs were entitled to our judgment.

I still retain that view, and my judgment proceeds on the following grounds: that the lands, in respect of which the plaintiffs were assessed are public roads or highways, and come within some of the exemptions mentioned in the 9th sec. of the Assessment Act, particularly sub-sec. 6, and so not liable to taxation; and that the Assessment Act does not provide for or contemplate such a subject for taxation as is now contended for.

It was urged for the defendants that the terms "land" &c., by sec. 3 of the Act applied to buildings or other things erected upon or affixed to land; and that such erections or fixtures are assessable against the owner thereof, under the term land, etc., *per se*, separate and distinct from the soil or land on or to which they are affixed, and so liable even if the land itself was exempt from taxation, as in the case before us.

Sec. 3 of the Assessment Act enacts, "The terms 'land,' 'real property,' and 'real estate,' respectively, include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed in any building as to form in law part of the realty," &c.

I cannot help regarding that section to mean anything else but a legislative definition of what shall be comprehended in the term land, and as forming part of land assessed, with a view to its valuation; that the word "include," as used, can only have its ordinary signification; that the matters included form part of the whole. In point of law, the term "land," "real estate," etc., would, without the meaning given to them by the section, have covered and included all that the section indicates.

It may be asked, with what object was sec. 3 inserted? In my opinion, as I have already remarked, with a view to valuation, and *ex abundanti cautela*, and for similar reasons as suggested in the case of the *The Constables and Burgesses of the Township of Charlton-upon-Medlock v. Walker*, 10 M. & W. 755, and referred to by Alderson B.—viz.: that the Act was intended to be enforced by persons not of a legal character, and who would, therefore, understand the words in their ordinary sense.

And so here the framers of the Assessment Act probably felt that if the terms land, real estate, etc., were merely used, it might be taken or understood by some assessors as the mere land itself, irrespective of erections or things affixed to it; and so, to avoid any misapprehension, the Legislature gave a meaning in the Act to guide and indicate to the assessors and others what was to be included in valuing land liable to taxation. I can find no provision in the Assessment Act applying to or for guiding assessors in the assessment of or for a separate valuation of buildings on or things affixed to land, as is here attempted to be taxed.

The whole scope of the statute is inconsistent with any such assessment, and I find no provision contemplating or applying to these defendants, or to other parties using the

streets in the way or under the authority by which the plaintiffs laid the rails.

Assuming that the public streets are not exempt from taxation, the plaintiffs are not occupiers of the land. They are not entitled to the exclusive occupation of the rails, which are laid by virtue of an Act, and under the authority and with the consent of the municipal authorities; they cannot be termed owners, freeholders, householders, or tenants in respect of the land occupied by the rails. The various provisions in the Act as to description, ownership and valuation of lands, as well as the enactment for making the tax a lien on the land and providing for its sale for arrears of taxes, &c., afford abundant proof in my judgment of the inapplicability of the Assessment Act to the taxation here contended for, and that such a subject for taxation never was contemplated.

If the Legislature intended that buildings or other things affixed to land should, in certain cases, be assessed against the owners or proprietors of such things, distinct or irrespective of the land itself exempt from taxation, it is only reasonable to suppose that the Legislature should have so expressed its intention. I need hardly refer to authorities to shew that where an Act is intended to or invoked to impose a tax, its construction must be clear beyond all reasonable doubt. My opinion rests solely upon the terms of our Assessment Act.

The various English authorities referred to by the defendants in my judgment are not applicable to the circumstances of this case, and I think quite distinguishable, as they are based upon statutes quite different from our Act.

The only cases that I have met with that have a bearing upon the one before us are *Williams v. Pritchard*, 5 T. R. 2, and *Eddington v. Bonner*, 1b. 4, where it was held that if lands are by statute exempt from taxation, so must also be the buildings erected thereon.

The case of *The Governor and Company of Chelsea Waterworks Co. v. Bowley*, 17 Q. B. 358, was a special

case somewhat like this. There the plaintiffs were authorized by a local Act to lay pipes in the streets, and they were assessed as holders of the land where they laid pipes. In an action for distraining, they were held not liable to assessment for the land occupied by those pipes.

Lord Campbell, C. J., in giving judgment, said, at p. 360—"The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another, and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us, for this purpose, to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditament; nor do we think that the pipes when laid can be so considered, within the meaning of the Land Tax Acts. These Acts, in speaking of lands and hereditaments, contemplate property to be let by a landlord to a tenant, and property the land tax of which might be redeemed. The whole scope of the Acts is to throw the tax as a charge upon the landlord; and the tenant, having paid the tax, is authorized by sec. 17, of Stat. 38, Geo. III., ch. 5, to deduct it out of the rent. The company are not the owners of the land where the pipes lie; nor are they the tenants of this land; and there is no rent from which they can deduct the amount of the assessment when they have paid it."

Now, our Assessment Act contemplates the party assessed for land to be a householder, freeholder, or tenant—these plaintiffs are neither owners, householders, freeholders, nor tenants of the land of the streets in which the rails are laid.

For these reasons I cannot concur in the view taken by the majority of the Court.

The plaintiffs, in my opinion, are entitled to judgment.

Judgment for defendants.

IN RE GIFFORD AND THE CORPORATION OF THE TOWNSHIP OF DARLINGTON.

Certificates for tavern licenses—Power to limit.

Held, Wilson, J., dissenting, that before 37 Vic. ch. 32, O., a township municipality was not authorized to pass a by-law that in each and every year thereafter there should not be more than four *certificates* for obtaining tavern licenses issued in the municipality; for that there was no power to limit the number of such certificates, and there was a substantial difference between that and limiting the number of licenses.

Quære, as to the necessity for an annual by-law before 37 Vic. ch 32, O.

During Hilary term, *Hector Cameron*, Q. C., obtained a rule *nisi* calling on the corporation to shew cause why a by-law entitled, "A by-law to limit the number of tavern licenses to be issued in the township of Darlington, and to define the amount of fees to be paid therefor," should not be quashed, with costs, on the grounds:—

1. That there is no valid statutory or other authority in the said corporation to pass such a by-law, or to interfere with or restrain the freedom of trade; and that the statute of the Legislature of Ontario authorizing municipal corporations to limit the number of tavern licenses, is unconstitutional and beyond the powers of the said Legislature.

2. That the said by-law limits the number of certificates to be issued for obtaining tavern licenses in the said municipality, but does not limit the number of tavern licenses to be issued.

3. That the said by-law, passed in the month of December, professes to regulate the number of certificates to be issued in all future years until the by-law be repealed, whereas, according to the provisions of the statute, the municipal council for each year alone has power to pass such a by-law for that year.

The by-law moved against was passed on the 6th December, 1873, and was entitled as mentioned in the rule.

It enacted as follows: "The municipal council of the corporation of the township of Darlington hereby enacts, and be it enacted by authority of the same, that in each and every year from the passing of this by-law, until the same is repealed, there shall not be more than four certificates

issued for obtaining tavern licenses in this municipality. And be it further enacted, that for each tavern license issued the sum of \$40 be paid to the township, exclusive of the Provincial duty. And be it further enacted, that all former by-laws, or parts of by-laws, are hereby repealed."

In this term, *J. G. Scott* shewed cause. The by-law is to limit the number of certificates for tavern licenses, but this is in effect limiting the number of licenses, and so is warranted by 32 Vic. ch. 32, sec. 6, sub-sec. 4, O. It is not necessary in passing a by-law under a statute to adopt the very words of the Act, it is sufficient if the by-law secures what the Act intended. If the by-law is substantially right that is enough: *Re McMichael and the Corporation of the Township of Townsend*, 33 U. C. R. 158; *Re Cameron and the Corporation of the Township of East Nissouri*, 13 U. C. R. 190. Next, as to the objection that the by-law is not for the year only in which it is passed, the 32 Vic. ch. 32 sec. 6, sub-sec. 4 does not require an annual by-law. As to the question of the right of the Ontario Legislature to pass the Act. That Legislature either has the power, or it was equally out of its power to repeal the Act of 1866 of the late Province of Canada, and that Act is in force; and if so, under that the municipality has power to pass the by-law in question. But under the British North America Act, sec. 92, sub-secs. 8 & 9 the power, it is contended, is conferred on the local Legislature. It is not an interference with trade and commerce within sec. 91 of that Act. (a) *Dillon Mun. Cor.* 2nd ed. vol. i. p. 92; *Salk*. 83; *Wilcocks* on Corporations 143; *Rawlinson* on Corporations 163; *Regina v. Boardman*, 30 U. C. R. 563; *Davis v. Bowes et al.*, 15 U. C. R. 280 were referred to.

Hector Cameron, Q. C., contra. Limiting the number of certificates and limiting the number of licenses are not identical, and by no means necessarily produce the same effect. If the licenses only were limited certificates might be granted

(a) See *Re Slavin and the Corporation of the Village of Orillia*, H. T. 1875, not yet reported, where it is held that municipalities may limit the number of tavern licenses, and prohibit the issue of shop licenses. The same question is discussed in *Regina v. Taylor*, in the same term, not yet reported.

to every applicant who was qualified, and the licenses granted to the best of these persons. As to the argument that the by-law is not to be annual because it is not so stated in the statute—the statute does not say the certificates are to be annual, yet it could not be argued that they are not. In the British North America Act the powers of the local Legislature are limited, the reserve power is in the Dominion; there is therefore an exclusion of other powers than those limited. *Re Coyne and the Corporation of the Township of Dunwich*, 9 U. C. R. ; *Regina v. Scott*, 34 U. C. R. 20; *Regina v. Burnside*, 8 U. C. R. 263, were referred to.

MORRISON, J.—I am of opinion that this by-law cannot be supported upon the second ground of objection taken in the rule.

I can find no authority in the License Act of 1868 enabling a municipality to pass a by-law that there shall be no more than a certain number of certificates issued for obtaining tavern licenses.

For granting such certificates, independent provision is made by section 12 of the Act, and no by-law is required for any such purpose, as the municipal council, in each case of an application for such a certificate, has to decide whether they will grant it or not; and I see no power given to the council to overrule that section of the statute, or control the action of the council under it.

Such a by-law, in my opinion, would be inoperative to restrain the council from considering and granting as many certificates as they might think proper, if the requirements of the section are complied with. The certificate would be useless if the issuer had exhausted the number of licenses he is authorized to issue.

Such a by-law cannot control or regulate the issuer of licenses as to the number of licenses he is to issue.

It is a matter of no moment how many certificates may be issued, as the issuer, by the section 9 of the statute, is restrained, and cannot issue a greater number of tavern licenses than is mentioned in the certificate to be given by the clerk of the municipality as required by the preceding

section 8, a certificate which has to be delivered to the issuer on or before the 15th February in every year, stating the number of tavern licenses (not certificates for licenses) to be issued for the licensing year commencing on 1st March.

The by-law is not one, as argued, for limiting the number of tavern licenses, authorized by sec. 6, sub-sec. 4, to be passed, but one to limit the issue of certificates for licenses to four in any year thereafter,—for which, as have said, I find no authority, and none was referred to, so to control the action of future councils in that respect.

This by-law, no doubt, was intended, as argued, to limit the number of tavern licenses that the issuer was to issue, and was intended to be a by-law under the authority of sec. 6, sub-sec. 4; but it is not so.

I therefore think it is bad, as being unauthorized, and must be quashed.

It becomes unnecessary to consider the other points raised, or to say whether it was a by-law that should be passed annually; as a new license law, 37 Vic., ch. 32, O., has been passed in the last session, providing that all such by-laws shall be annual by-laws.

I think this by-law should be quashed.

WILSON, J.—The course of proceeding pointed out by the statute to obtain a license is as follows:

The applicant for a license shall petition the municipal council for the same: 33 Vic., ch. 28, sec. 4, O.

The inspector shall then report whether the applicant is a fit and proper person to have a license or not, and has all the accommodation required by law or not: *Ibid.*

If the report be favourable, then the Reeve and Clerk in townships, on “the application of any person requiring a license,” or the transfer of a license, shall, if he has complied with the requirements of the law and the by-laws and regulations in that behalf, grant to him a certificate stating that he is entitled to a license: 32 Vic., ch. 32, sec. 14, O.; 33 Vic., ch. 28, sec. 5, O.

The applicant shall forthwith take the certificate to the

issuer of licenses, and on presentation of it to him, and on payment to him of the Provincial duty thereon, the issuer shall issue a license to the applicant: 32 Vic., ch. 32, sec. 14, O.

The license shall, however, be of no effect until the applicant shall pay to the Treasurer of the municipality the sum fixed for the license by the municipality, and until he shall obtain a receipt for the same, signed by the treasurer, to be endorsed on the license: *Ibid.*

The municipality shall not take any money for any certificate until after the license has been issued: sec. 15.

To prevent a greater number of licenses from being issued than the municipality has limited, the Clerk shall, on or before the 15th of February in each year, deliver to the issuer of licenses a certificate under his hand, stating the number which is authorized to be issued for the then next ensuing year: sec. 8.

And the issuer of licenses shall not issue a greater number of licenses than is named in such certificate: sec. 9.

The municipality has power by by-law to limit the number of tavern and shop licenses: 32 Vic., ch. 32, sec. 6, sub-sec. 4, O.; and for granting certificates to obtain licenses: sub-sec. 1.

The by-law in question has limited the number of *certificates* for licenses to be issued; and it is said it is bad, for the by-law should have been to limit the number of *licenses*.

It was answered that limiting the number of certificates was the same in effect as limiting the number of licenses; and it was said that the Municipal Act of 1866, sec. 249, sub-sec. 4, while it was in force sanctioned such a limitation, because, while it authorized the municipality to limit the number of licenses, it also provided that in no municipality should tavern license *certificates* be granted in a proportion greater than one for every two hundred and fifty souls resident therein. That enactment was repealed by the 32 Vic., ch. 32, sec. 40, O.

That enactment practically limited the number of licenses to be issued, because it limited the number of certificates,—the one being founded upon the other.

Must the municipality grant a certificate to every qualified person applying for a license, the limitation of one license to every two hundred and fifty of the inhabitants being no longer in force?

If it must, then the by-law is unquestionably bad, by limiting the number to four.

I am not satisfied the municipality is obliged to give a certificate to every qualified applicant for a license.

If it is, then there may be forty certificates while there are to be only four licenses; and that will enable the issuer of licenses—who is a Government officer: 32 Vic., ch. 32, sec. 4, O., and who may not be a resident of the township, nor, so far as I see, of the county,—to select at his pleasure the four out of the forty who are to get the licenses, and to provide the tavern accommodation for the township.

I do not think that was ever intended by the Legislature; and it is not right it should be so; and it may be to guard against such a risk, or it may be such a practice, that the by-law complained of has been passed.

There can be no use in the township issuing forty certificates, and going to all the expense of sending the Inspector to examine and report upon each applicant's fitness to keep, and upon the accommodation he can give for, a tavern which is never, in all probability, to be opened.

I think the municipality itself may properly desire to have the choice of its own tavern keepers. I do not see what possible harm it can do to pass a by-law of this kind; and I see some advantages that may be secured by it.

It was said if this by-law were not quashed it would enable the municipality to grant four certificates, on which nothing is payable, to persons, upon the understanding that they should not apply for licenses, which would block all others off from getting certificates, and so the municipality would gain the same end of there being no tavern in the township, and of establishing a prohibitory law by that indirect method, without the necessity of submitting the question to the election of the people.

If it were suggested that the by-law was passed with any

such intent, or that it had been used for that purpose, there might be force in the argument, although the argument might not be altogether convincing.

The statute says the applicant, on getting his certificate, "shall forthwith take the said certificate to the issuer of licenses," and, on payment of the duty, the license shall issue: Sec. 14,

So that if the holder of the certificate held back his application for a license for any evasive purpose, the municipality could be compelled to grant a sufficient number of other licenses to persons who would honestly act upon them.

These persons may act in the like way, it may be said, and so the benefit of the Act would be frustrated; and it is, therefore, necessary to prevent such proceedings, and so to quash the by-law.

But would the quashing of the by-law answer the purpose of giving to the township the prescribed number of taverns? Suppose the holders of the certificates were forthwith to get their licenses and to refuse or delay purposely and evasively to pay the municipal charge for it, or suppose the licensees paid the municipality and still refused to open their taverns, how would that be cured? The licenses may expressly be limited in number, and what is to be done if they all refuse to act upon their licenses?

It may be said that is not at all likely—that having paid their money they will be sure to use the privilege they have bought.

That may be very true as regards those persons who are looking after their own interests, but we are not speaking of such persons. We are speaking of those who, either in collusion with the Council or among themselves, are trying to evade the law and to have no taverns in the township, and are scheming to accomplish that purpose. And to such persons and in such a cause—the cause of temperance—the government duty and the municipal charge would be nothing.

If persons may so combine and successfully carry out their project, they would lose their money to be sure, but there would be no tavern for all that, and what the people

want would be a tavern or the proper number of taverns, and it would be of little concern to them whether particular persons were or were not foolish enough to throw away two or three hundred dollars a year on a pet scheme for their own gratification.

There is nothing in this statute nor in any by-law that can be passed to prevent such a proceeding.

Any law or by-law may be abused, but it is not a bad law nor bad by-law on that account.

If this law or by-law be evaded or be attempted to be nullified in that way, I think it would be found there was some remedy to be had to counteract such acts or attempts, and to give the locality affected the benefit of the law or of the by-law.

But if the law may be as readily frustrated as the by-law may be, it is a strong argument that the by-law is not necessarily an objectionable one.

And if relief can be given against the evasion of either of them it can much more easily be given in aid of the by-law when the holder of the certificate does not act upon it, than it can be under the statute when the issuer has granted his full quota of licenses and has been paid for them.

He might decline to issue more than the proper number, but the municipality need not hesitate a moment about issuing more than the fixed number of certificates, for which the parties had paid nothing, and which they will not and do not mean to act upon.

If there were a by-law that only four licenses should be issued and only four certificates for license be granted, I do not think it could be said that such a by-law would be bad. The one would be connected with the other.

What harm then can the present by-law do, or what objection can there be to it, if the self-same object can be accomplished by or under it?

I think the by-law was not required, and that the better form in which to have passed it would have been to have made it applicable to the licenses and not to the certificates; but I cannot say it is a bad by-law. And it is not said

it was passed with any improper intent or for any wrongful purpose, and I cannot assume that against the Council.

Nor is it said that the full number of certificates has not been granted, nor that the full number of licenses has not been issued, nor that the full number of taverns has not been opened, nor that they are not all in active, perhaps too active, operation.

I should say that it is not stated in the Act that there must be a by-law passed each year declaring the number of licenses to be issued for the year. The Act does not say that it must be done, nor does the reason of the thing require it.

I am obliged therefore to decline interfering at the present, and on the information now before us. I think the applicant has not sustained his case.

RICHARDS, C. J.—The by-law limits the number of certificates to be issued for the obtaining of tavern licenses within the limits of the municipality.

The statute authorizes them to pass by-laws for granting certificates to obtain tavern licenses, and also to pass by-laws for limiting the number of tavern licenses.

It is argued that what the corporation has done by limiting the number of certificates is in effect limiting the number of licenses.

This may be so. I do not think, however, in a matter of this kind, when legislation has been had on the subject which makes plain some of the questions brought up in discussion on this by-law, that we should take up much time in considering whether we could not maintain the by-law as having in effect done what the legislature authorized, although it is admitted that it has not literally done so.

I am not prepared to say there is not a substantial difference between what they have done and what they were authorized to do under the statute, and I think it is better to quash this by-law and let another be passed under the Act of last session, by which several of the questions raised on the argument of this case may be settled without difficulty, and in accordance with the last declared will of the Legislature.

Rule absolute.

MANNING V. DEVER ET AL.

Lease—Yearly tenancy—Notice to quit—Waiver by acceptance of rent.

C., on 1st May, 1866, leased to defendant for ten years at a yearly rent, payable quarterly on 1st January, April, July, and October, with a proviso that if the lessor should sell during the term the lessee would give up possession on six months' notice. On the 11th November, 1872, a notice to quit at the end of six months was given to defendant, signed by C. and by S., to whom C. had sold the premises, and to whom C. conveyed on the 7th May, 1873. Defendant paid rent to C. and S. to 1st January, 1873. S. conveyed to the plaintiff on the 12th July, 1873, and, on the 28th October following, defendant, who had continued in possession, paid to the plaintiff the quarter's rent due on the 1st October.

Held, that defendant was in under a yearly tenancy created by plaintiff's acceptance of rent, and could not be ejected by plaintiff without notice. *Quære*, whether he could not claim under the original lease, on the ground that the notice to quit by C. & S. had been waived by the acceptance of rent by S.

By his notice he claimed under the original lease only; but, *Held*, that if necessary, this should be amended.

EJECTMENT for land in Toronto. This case was tried before Strong, J., without a jury, at the last Winter Assizes held at Toronto.

Certain facts were admitted on both sides, and a verdict *pro formâ* was entered for the plaintiff, leave being reserved to defendant, Dever, to move to enter a verdict for him, should the Court be of opinion the plaintiff was not entitled to succeed.

From the facts admitted and put in at the trial, it appeared that by a lease dated the 1st May, 1866, the Hon. Wm. Cayley demised the premises in question to the defendant for ten years, at a yearly rent of £100, payable quarterly, on the first days of January, April, July, and October in each year. The lease contained a proviso, that if the lessor should sell or dispose of the premises before the expiration of the lease, he might give the defendant six months' notice in writing, and thereupon the lessee would, at the expiration of the said six months' notice, immediately give up quiet and peaceable possession of the said premises to the lessor: that a notice to quit and deliver up possession of the premises at the expiration of six months from the service of the notice, was served on

the defendant on or about the 11th of November, 1872, being the date of the notice, which notice was signed by the lessor, Mr. Cayley, and by one Stephens, to whom Mr. Cayley had sold the premises; and by deed dated the 7th May, 1873, Mr. Cayley conveyed the same to Stephens: that rent was duly paid by the defendant to Mr. Cayley and to Mr. Stephens, to 1st January, 1873: that by a deed of bargain and sale made on the 12th July, 1873, but dated the 1st July, Stephens conveyed the premises to the plaintiff, the defendant being still in possession of the premises; and on the 28th October following the defendant paid to the plaintiff a quarter's rent, due on the 1st October, he giving to the defendant, Dever, the following receipt:—

“Received from Mr. Dever the sum of \$100, being payment of house, King street, to October 1st.”

No other notice to quit was given than the one signed by Mr. Cayley and Mr. Stephens.

On the 28th March, 1874, this action was brought.

The plaintiff, by his notice of claim, claimed through Stephens and Mr. Cayley, and by virtue of a notice determining the tenancy created by the lease of 1866 from Mr. Cayley.

The defendant, besides denying the plaintiff's title, claimed under the lease from Cayley.

There were two defendants, sub-tenants of Dever, who allowed judgment to go by default.

During this term, *J. F. Smith* obtained a rule in pursuance of the leave.

During same term *Bain* shewed cause. Our contention on the facts admitted is, that the lease terminated at the end of May, and the subsequent payment was not made on the lease. It may have the effect of creating a new tenancy between Manning and Dever; but even if a new term is created, it will not avail the defendant, for the lease is gone. [WILSON, J.—Not when he denies your title? He should have specifically pleaded the new tenancy.

J. F. Smith, contra. The plaintiff must recover on the

strength of his own title. If the plaintiff received rent waiving the notice, he is not entitled to bring ejectment. The possession was not given up at the determination of the tenancy. So, whether a new tenancy was created, or, the old continued, the plaintiff could not bring ejectment.

MORRISON, J., delivered the judgment of the Court.

The question is whether, under the circumstances, the plaintiff is in a position to maintain this action.

On the part of the defendant, Dever, it was contended that the acceptance of rent by Stephens, the representative of Cayley, was a waiver of such notice, and that the acceptance of rent by plaintiff was under the lease, and that a yearly tenancy was created by the payment of rent; and that in the latter case a regular notice to terminate the yearly tenancy was necessary.

It seems to us that the defendant, Dever, is either in possession under his original lease, or he is in as tenant from year to year; and in either case the defendant is, in our opinion, entitled to our judgment.

The notice to quit or determine the lease at the end of six months was a joint one, signed and given by Mr. Cayley and his vendee of the premises, Stephens; and after the latter obtained his conveyance, he allows or rather consents to the defendant remaining in possession, and accepts from him the rent reserved by the lease.

That being the case, the defendant Dever was by implication a yearly tenant, being in occupation and paying rent with reference to a yearly holding.

A tenant who continues in occupation after his lease has expired, and pays rent, is presumed to hold as tenant from year to year.

Then Stephens conveys the premises to the plaintiff on the 1st July, the defendant Dever still remaining in occupation; and the plaintiff also accepts from such defendant the quarter's rent due on the 1st October following.

Now, this rent he received either under the holding the defendant had under Stephens, or as under a new ten-

ancy with the plaintiff, which tenancy may be presumed from the occupation of the premises and the payment of a quarter's rent.

In the view we take of the case, it is not necessary to determine whether the acceptance of rent by Stephens was a waiver of the notice by himself and Mr. Cayley,—for assuming there was no waiver, the inference to be drawn from the facts admitted is, that the defendant, Dever, continued to occupy as a yearly tenant to Stephens, and subsequently under the plaintiff, and was, as such tenant entitled to the usual notice to quit; and no notice having been given, the plaintiff is not entitled to recover in this action.

It is hardly necessary to refer to authorities to shew that a yearly tenancy may arise by implication when rent is paid in respect of the occupation of premises ordinarily let from year to year, or when a tenant continues in occupation after the determination of his lease, and pays rent.

The written admissions put in at the trial, (for there were no witnesses examined), are very meagre as to the exact way in which the defendant, Dever, continued to occupy the premises and pay rent to the respective parties; but we think quite sufficient appears from which it may be fairly inferred that the rent was paid and received as portions of a yearly rent.

It was quite competent for the plaintiff to shew circumstances that would repel the legal implication which arises from the receipt of rent unexplained; as said by Wilde, C. J., in *Doe d. Lord v. Crago*, 6 C. B. 91, at p. 98; but here he has not done so.

It was also contended at the argument, that as the defendant claimed to hold under the original lease from Mr. Cayley, he should not be allowed to set up any other ground of defence.

No such point was taken at the trial; but even if it was, in order to do justice between the parties, and if necessary, we should allow an amendment.

We are not satisfied that there was not evidence of a

waiver, but we do not think the case requires any expression of opinion on the point.

We think the rule should be made absolute to enter a verdict for defendant.

Rule absolute.

REGINA V. BELMONT.

*Regulation of taverns—Prohibiting light in bar-room—32 Vic. ch. 32, sec. 6, O.
Construction of.*

The 32 Vic. ch. 32, sec. 6, O., enables the Police Commissioners to pass by-laws for "regulating" licensed taverns. A by-law under this authority provided that the bar-room should be closed and unoccupied, except by members of the keeper's family or his employees, *and should have no light therein except the natural light of day*, during the time prohibited by the by-law for the sale of liquors, *i.e.*, from 12 at night to 5 a.m.

Held, that the by-law was unauthorized, and a conviction under it was quashed.

During last Easter Term *N. Murphy* obtained a rule *nisi* calling upon the Police Magistrate of the City of Toronto, and the informant, to shew cause why the conviction made herein should not be quashed, on the ground that the Commissioners of Police, in enacting the by-law under which the conviction took place, exceeded their powers; that the by-law, so far as the 18th sec. is concerned, is null and void; and on grounds disclosed in affidavit and papers filed.

The by-law in question was one passed under the authority of 32 Vic., ch. 32, sec. 6, O., and it recited the 1st, 2nd, 3rd, 5th, and 6th sub-secs. of sec. 6.

Sec. 6 enables the Commissioners to pass by-laws "for regulating the houses or places to be licensed," "the time licenses are to be in force," &c., and the "sums to be paid therefor."

And sec. 18 of the by-law provided "that the bar-room of every licensed tavern in use for bar-room purposes shall be closed and unoccupied, except by members of the

family of the keeper of such licensed tavern, or by a person in his employment, (and shall have no light therein except the natural light of day) during the time prohibited by this by-law for the sale of intoxicating liquors, save and except for medicinal purposes," &c.

By the preceding section the time prohibited was after the hour of 12 at night till 5 a.m. the following day.

The conviction complained of was "for unlawfully and knowingly having in the bar-room of his, defendant's, said licensed tavern, a light other than the natural light of day, to wit, the light of and from a gas burner reflecting a light in said bar-room during the time prohibited," &c., contrary to the provisions of the by-law of the Police Commissioners.

During Easter Term, *C. Robinson*, Q. C., shewed cause. 32 Vic., ch. 32, O., and 33 Vic. ch. 28, O., authorize the police commissioners to pass such a by-law. They have expressly given them the power to *regulate* taverns, &c. The by-law must be interpreted, and it must be assumed that the commissioners were acting, reasonably; and the fact that if construed unreasonably and according to its strict letter it might lead to unreasonable results, is no ground for quashing it. See, also, 32 Vic., ch. 22, sec. 51, O.

N. Murphy, contra. Sec. 19 of the by-law is unreasonable. Give it its effect, and the family must sit in the dark, and a servant could not go in to wind up a clock. The cause why the light was used, on the occasion complained of, was a reasonable one; it was to wash up the dishes used at a supper which was concluded before the prohibited hours. It is not pretended that any liquor was sold, or that any of the evils which the Act, either in spirit or the letter, intended to guard against, occurred, or were likely to occur.

MORRISON, J., delivered the judgment of the Court.

It was contended that, under the power of regulating the houses or places to be licensed, the Police Commission-

ers had authority to pass a by-law such as the one in question, providing that the bar-room of any licensed tavern and any room of such licensed tavern in use for bar-room purposes shall be closed, and remain closed and unoccupied, except by members of the family of the keeper of the tavern, or by a person in his employment, and shall have no light therein, except the natural light of day, during the time prohibited by the same by-law for the sale of intoxicating liquors, that is, between the hours of 12 at night and 5 o'clock the following day.

The by-law provides that the bar-room shall be closed, and remain closed, yet still it may be occupied by the family, which implies the opening and shutting of the room.

It also prohibits (although it may be occupied) the use of light therein, except, what is not very likely they can have after 12 at night, the natural light of day; prohibiting light from a fire in a stove, which would be necessary in the winter time for the occupation of the room by family or servants, as well to prevent the freezing of the liquids kept therein.

It goes so far as even to prohibit the light, I may say, of the moon or the light from a gaslamp in the street penetrating the bar-room.

This conviction would meet the latter case, for the defendant is convicted of having, in the bar-room of his said licensed tavern, a light other than the natural light of day, to-wit, the light of and from a gas burner reflecting a light in said bar-room during the time prohibited.

What is intended or meant by reflecting a light, I cannot say. Its ordinary meaning is throwing back a light, but be that as it may, in our opinion the 18th sec. of the by-law is not authorized by the statute, or within its meaning or intent.

The power to pass by-laws for regulating the houses or places to be licensed, in our judgment, means regulations in respect of the sale of spirituous liquors therein, the hours and time at which they may be sold or prohibited,

and with reference to the accommodation of guests and in respect of gambling therein, and not allowing disorderly persons to frequent the premises, as provided by the 16th sec. of the by-law.

The regulation could hardly have contemplated that the private and domestic arrangements of the family should be interfered with, or that the bar-room could not be used by the family with a light when being closed for the sale of liquor during prohibited hours, and that a light should be an offence.

It would be most unreasonable, I think, to hold that within those hours the Police Commissioners could prohibit the tavern keeper, or his family, or servant, during their occupation of it, from using a light; or if they were cleaning or washing the room that the using of a light would be an offence, subjecting the tavern-keeper to a penalty of \$50, as provided by this by-law, or imprisonment with hard labour for six months; or, as in the case before us, where it appears, from the evidence returned, the tavern keeper and his servant were using a light clearing away dishes after a supper that had been provided that evening at the house.

It is not pretended, nor does it appear by the evidence, that the bar-room was open for the sale of liquors, or that persons other than the tavern-keeper, his family, or servant were therein at the time. The conviction is for merely having a light therein.

I notice that the by-law does not prohibit the use of a light during the prohibited hours in a saloon; if it is proper to prohibit the use of a light in a tavern, it is equally so in a saloon, which is only a place for drinking, and frequently a den of vice.

As an authority bearing on the case, I refer to the *Calder & Hebble Navigation Co. v. Pilling, et al.*, 14 M. & W. 76.

We are quite well aware how difficult it is for the municipal authorities to enforce regulations for the orderly keeping of such licensed houses, as well to meet the devices parties may resort to for the purpose of evading and

contravening them, and no doubt it was with such a view the 18th sec. of the by-law was passed; but at the same time care must be taken when creating offences to which are attached severe penalties, that the Legislature has clearly given the power to do so.

On the whole, we are of opinion that the conviction should be quashed. There will be no costs.

Conviction quashed.

BAKER ET AL. V. FAWKES.

Sale of goods—Warranty.

The question being whether defendant had warranted a hearse sold by him to the plaintiff to be new, it appeared that defendant, having two hearses for sale, one of which was old and the other all new except a part of the running gear, the plaintiff came to him to purchase. Defendant said his old hearse was at a place named, where they went to see it. Plaintiff then said that he wished to see the new one, and they went to the paint-shop, where it was, the wheels being off, and the last coat of paint not finished, with some ornamental work yet to be done. The plaintiff examined it, and having agreed on the price, then went to the house of one S., a friend, where the following memorandum was drawn up:—

“Messrs. Baker & Blewett (plaintiffs), to S. Fawkes (defendant),—
Drs.:—

To 1 new hearse; 1 set ostrich plumes; also, 1 set white plumes	\$800
Received on account	300

Interest at 7 per cent.—balance \$500

“Hearse to be delivered at station in Toronto, finished and complete.”

This the plaintiff said was prepared by S. as the memorandum of the terms of sale. The last line was added at plaintiffs' request. S. said he wrote the memorandum (which was not signed by defendant) without dictation, and used the word new to distinguish it from defendant's old hearse. The defendant said he always spoke of the two in that way for distinction: that he told the plaintiff a portion of the running gear was not new, and that the plaintiff, who examined it carefully, could not have failed to see this. The plaintiff on the other hand, said the defendant told him it was new, which he believed, and that he would not otherwise have purchased.

Held, that was a question for the jury whether defendant sold his new hearse, calling it new simply as a matter of description, without any warranty that it was new, or whether he described it as a new hearse, and contracted to sell it as such; and in an action on the alleged warranty a nonsuit was set aside.

DECLARATION.—First count: that defendant fraudulently represented a hearse and plumes to be then new, and theretofore unused, and induced the plaintiffs to buy the same from the defendant for \$800; whereas, the hearse was not new, and theretofore unused, as the defendants well knew—whereby the plaintiffs lost the sum of \$270.

Second count: that the defendant was possessed of a hearse with plumes, the wheels and under-gearing of which the defendant then well knew were not new, and had been used, and were not new; and by representing to the plaintiffs that the wheels and under-gearing had not been used, and were new, induced the plaintiffs to buy the hearse, with plumes, for \$800, whereby the plaintiffs lost \$270.

Third count: that the plaintiffs, on the 8th of April, 1873, bargained with the defendant to buy of him a hearse, with plumes, for \$800; and the defendant then falsely, fraudulently and deceitfully exhibited to the plaintiffs a hearse with plumes, and falsely, fraudulently and deceitfully represented to the plaintiffs, and induced them to believe that the same was a fair sample of the hearse with plumes bargained for, and that the hearse with plumes was equal to and of the same description with, and of equal value and like quality with the hearse with plumes exhibited. And the plaintiffs, confiding and relying in the hearse with plumes so exhibited, and the representations and inducements of the defendant so made, at the request of the defendant, were induced to buy and did buy the hearse with plumes of the defendant for \$800; whereas at the time of bargain and sale the hearse with plumes so exhibited was not a fair sample of the said hearse so bargained for, nor was it equal to and of the same description with, and of equal value and like quality with the hearse with plumes so exhibited, but of inferior and much worse description and quality, and of much less value; and the defendant falsely and fraudulently deceived the plaintiffs in the sale of the said hearse with plumes as aforesaid—by reason whereof the plaintiffs have lost \$270.

Fourth count: for not delivering within a reasonable

time a hearse with plumes, to be new and one that had not been used, and of the best description, for \$800, which the plaintiffs bought from the defendant at his request; but the defendant delivered an inferior article, with wheels and running gear which were not new, and had been used, whereby the plaintiffs have lost \$800.

Pleas—1. To the first three counts: not guilty.

2. To the fourth count: that defendant did not promise.

3. To the fourth count: that defendant did deliver the goods according to the contract.

4. To the fourth count: that the plaintiffs were not ready and willing to accept the goods according to the contract.

Issue.

The cause was tried at the last Fall Assizes at Chatham, before S. Richards, Q. C., sitting for Galt, J.

At the trial, the material evidence was as follows:—

Charles Baker, one of the plaintiffs, was called as a witness and said: the defendant said his old hearse was hired out in the city, (Toronto, where he lived, and where the conversation took place—the plaintiffs living in the township of Harwich), and his new one was not finished, that it was in the paint shop; he took me to see the old one, it was at his dwelling house, he said the price of it was \$450; I told him I wished to see the new one; we went to the paint shop, and saw a hearse there; defendant said that was his new one; the wheels were off it, but they were in the same room; the tongue was not on, nor was it finished; the hearse was painted, but it wanted the final coating; he called it flowing. The sockets for the plumes had to be put on, which were to be silver-plated similar to the posts and railing inside; ornamental work was to be put on the sides, and there was to be some fixing done under the seat; there were glass sides. I looked at the hearse, and liked it very well; everything I looked at about it appeared to be new, the running gear as well as everything else; it was a dull, cloudy day. We concluded the price at \$800 for the hearse and plumes. I paid

\$300 down, and gave our note for the balance, payable in a year. We went into a friend's house, and defendant asked for some pens and paper to draw up a writing, which I wanted to shew my partner what I had done. Defendant asked the friend to draw it up. Defendant told the friend he had sold his new hearse, and the defendant prepared this as the memorandum of the terms of sale. I wanted the words *finished and complete* to be added, and they were added. I wanted defendant to sign it, but the friend said it would operate as a receipt for the whole \$800. The paper was given to me. The writing is:—

“Toronto, April 8th, 1873.

Messrs. Baker & Blewett,

To S. Fawkes, Drs.

To 1 New Hearse; 1 set Ostrich Plumes;

also, 1 set White Plumes, \$800

Received on account, 300

Interest at 7 per cent. Balance, \$500

Hearse to be delivered at station in Toronto,
finished and complete.”

In cross-examination he said: A hearse did come from defendant to us to Thamesville station. We have it still. It is the same style and pattern as the one I bought. I can't say if it is the same hearse or not. I looked at the wheels and axles when I saw them in Toronto. Defendant did not tell me the running gear was not new; he said the hearse was new. I have no experience in wood work or cabinet work; only commenced the business this spring. The principal part of the running gear is old. The axles are old, but whether the wheels are old or not, I can't say. The sockets for the plumes are wood and tinned over, and are not silver.

Re-examination. If defendant had told me that any part was not new, I would not have bought. It was not an old one I wanted.

Mr. *Blewett*, the other defendant, said when he first examined the hearse he found the new part was inferior,

and the running gear was all old excepting the tires, felloes and spokes of the wheels. He was not sure about the hubs; part of the iron work in the box he believed to be old. They had used it ever since. The axles were old. The circle or turn-table was old. The springs old. The track of the hearse was too wide.

Mr. *McBride* examined the hearse, and valued it. He stated what was new and what was old. He valued the hearse at \$400. He said the gearing of the hearse, if new, would be worth \$200, and the present gearing was worth only \$100.

Mr. *Bevan* was also examined and valued it. He said if the hearse were all new it would be worth \$700 without the plumes; that the stay braces inside of the sills in the body of the hearse were old; the gearing, if new, would be worth \$200; as it was, it was worth \$100. The hearse was a late design, but the workmanship was poor. He valued it at \$400.

For the defence, counter evidence was given of the value.

The defendant was examined. He said Baker examined the hearse very carefully. He got on the top of it, and sprung it up and down with all his weight, as defendant thought, to test the springs and workmanship. Defendant never tested them in that way. He then examined the gearing as much as any man could do. He stooped down at the sides, examined it underneath. Defendant said it was all new but a portion of the gearing. He went round it again and again, and examined it for three quarters of an hour. He asked no particular questions about it. He examined it inside. He said he liked it, and asked the price. A new hearse like it could not be built in Toronto for less than \$1,000, exclusive of the plumes. Defendant told plaintiff so. This was in the forenoon. The plaintiff took dinner and supper at defendant's house. He then said he would give \$800 for the hearse and two sets of plumes; after a while defendant took it. That put the hearse at \$675 and the plumes at \$125. Defendant had asked \$750 for the hearse. It had

cost defendant more than that. Defendant never said to plaintiff the hearse was entirely new. Defendant was in the habit of talking of one as the old hearse, and the other as the new hearse. He had never used the hearse. The wheels were perfectly new. When he said to plaintiff it was all new but a portion of the gearing, the plaintiff said nothing, but examined it more carefully. It was perfectly apparent that part of the gearing was not new. The marks of the old paint could be seen at a considerable distance. The plaintiff examined the axles; any one, on looking at them, could see they had been used. The arm of the axle was not injured: the name was on it still. He never deceived the plaintiff, nor told him what was not true. The gearing was not injured in any way. He had it in 1871.

Cross-examination. The gearing may have been four or five years in Toronto before he got it. It looked to be new when he saw it first. Williams, who before had it, used it occasionally. He did not use it after defendant got it. He said to plaintiff it was all new but a portion of the gearing.

Henry Stone said: He wrote the invoice produced; no one dictated it to him. He used the word *new* to distinguish that hearse from the defendant's old hearse. They were generally spoken of in that way. He bought out defendant's business four years ago. He commenced again, and sold out afterwards to Murphy. There would be a third in the value of the gearing between what it was worth as new and as old, and not more. The plaintiff said he wanted something to shew his partner what he had done. He suggested to defendant to make out an invoice debiting the hearse and crediting what was paid. Defendant requested witness to make it out. He did so. The plaintiff did not seem satisfied unless defendant would put his name to it. Witness said it was not necessary. The plaintiff made another objection; he said it was not shewn where the hearse was to be delivered, so the concluding words were added.

Cross-examination. Witness considered the name of the defendant at the top of the invoice as good as signing it at the bottom.

The builder of the hearse and the person who ironed it were examined, and they both spoke of its good workmanship and value.

The latter said the hearse would have been worth \$1,000 with different gearing; that the present gearing, as far as wear was concerned, was as good as new; but not so far as style was concerned.

A letter was also put in at the trial, dated the 28th March, 1873, written to the plaintiffs on behalf of the defendant, describing the hearses the defendant had for sale and calling one hearse "Hearse No. 2, or the second hearse," and the other, that which is in dispute, "No. 1, or the best hearse," and giving details of the ornaments, finish, &c., of each hearse.

A nonsuit was then moved for on different grounds; and it was entered accordingly.

In Michaelmas Term last, *Becher*, Q. C., obtained a rule *nisi* calling on the plaintiffs to shew cause why the nonsuit should not be set aside and a new trial granted, on the ground that the ruling at the trial, that there was no case made out and no evidence to go to the jury, and directing a nonsuit, was wrong,—for the plaintiff made out a case which should have been left to the jury upon some one or more of the counts.

During this term *Robinson*, Q. C., shewed cause. The whole evidence shews that the defendant never made such a warranty as is alleged; he never warranted to sell a new hearse; he had two hearses, one had been in use and was in use, the other was not quite finished, and had never been used; he called the one his old and the other his new hearse, and what he sold to the plaintiffs was his new hearse. The whole hearse was not new; the springs and axles and some other of the ironing were not new; they had been in use before, but they were perfectly good

and uninjured. The plaintiff, Baker, before the sale, minutely examined the hearse and tried the springs; and the defendant says that he told Baker the axles and springs were not new, but Baker made no answer to him. And besides that, it was sworn to that any one could have told that these parts were not new, for the old paint was then to be seen upon them. The plaintiffs had full value for their money; and from the plaintiffs' own evidence, there was only a difference in value of \$100 between the gearing which was supplied and perfectly new gearing. The statement, "one new hearse" in the account rendered, is not a warranty, and was not so intended or understood, any more than when the same statement was made in the verbal bargaining: *Walker v. Milner*, 4 F. & F. 745, 761; *Stucley v. Baily*, 1 H. & C. 405; *Chalmers v. Harding*, 17 L. T. N. S. 571; *Behn v. Burness*, 3 B. & S. 751, 757; *Hopkins v. Tanqueray*, 15 C. B. 130; *Craig v. Miller*, 22 C. P. 348; *Benjamin* on Sales, 2nd ed., 497, 506, 507. A verdict for the plaintiffs, had it gone to the jury, could not have been sustained, and the nonsuit, therefore, should not be set aside.

McMichael, Q. C., supported the rule. There was a warranty that the hearse was new. The evidence shews that the parties were bargaining for and about a *new* hearse, and that Baker was told and made to believe the hearse was new; and it cannot now be said that the defendant was selling his new hearse, or the hearse which he called new, as distinguishing it from his old one, for he said in his own invoice that he sold one *new* hearse, not *his* new hearse, nor hearse number one, but *a* new hearse. There was no occasion for a specific warranty, upon which so much stress was laid. The sale was of a particular chattel, a new hearse, and there was an implied warranty that the article would correspond with the description. The plaintiffs' witnesses stated the difference in value to be much more than \$100, nearly \$400. He cited *Allan v. Lake*, 18 Q. B. 560, 567; *Josling v. Kingsford*, 13 C. B. N. S. 447.

WILSON, J., delivered the judgment of the Court.

The question is, whether the learned Queen's Counsel was right in nonsuiting the plaintiffs; whether he should not have allowed the case to go to the jury?

The evidence of Baker was, that the defendant spoke of *his old hearse* being at one place and *his new hearse* at another place; and after having seen *his old one*, "I told him I wished to see his new one." The defendant said that was *his new one*. The defendant afterwards said to Mr. Stone, who wrote the invoice, he had sold *his new hearse*. The defendant said *the hearse was new*. Then the writing is *1 new hearse*.

There is really no difference between Baker's account of the transaction and that of the defendant, excepting that the defendant said he told Baker the axles and springs were not new; while Baker said the defendant did not say so.

In the letter of the 28th of March, 1873, to the plaintiffs, the hearse is described as "No. 1, or the best hearse."

Baker said the invoice was "prepared as the memorandum of the terms of sale. I wanted the words 'finished and complete' to be added, and they were added." The defendant was asked to sign it, but Mr. Stone said if he did it would operate as a receipt for the \$500, which sum had not been paid. The defendant said nothing of the invoice at the trial.

Mr. Stone described what took place substantially as Baker did; and the invoice, as it is drawn, is also in part an agreement, as the witnesses say Baker required it to be "Hearse to be delivered at station, Toronto, finished and complete."

It might be a question of fact whether the defendant, when he spoke of "his new hearse," did or did not mean to convey the idea, or did or did not convey the idea to Baker, that the hearse was new: that is, whether the defendant used the expression as only descriptive of which one of his two hearses he was selling,—his new or his old one as he called them,—without meaning at all to convey

the idea that he was asserting, or desired it to be understood, that he was selling a new hearse. As a mere description or designation in that sense, it would be quite right to call it "his new hearse," although it had been in use for a considerable time, or although it was formed in part of old materials.

But it might have been used by the defendant, and intended by him that it should have been understood by Baker in a different manner—that is, as an assertion that the hearse was new in fact, and that he was selling it as a new hearse.

And the fact that the hearse had never been used, and was not even finished at that time, would be some evidence that the defendant was describing it in fact as a new hearse, and that he knew well that Baker so understood him, and must have so understood him, and that he could not have thought anything else when he saw it in an unfinished state, and was told by the defendant it was not finished, and that some work had still to be done to complete it.

Baker, I should say, without any doubt, thought the hearse was in fact a new hearse; and under the circumstances stated, it would be difficult for him to understand anything else. It was called new. He was told it was not finished, and he saw it was not finished. In addition, the invoice describes it as "1 new hearse;" and by it the defendant has engaged to "finish and complete" it,—that is, *the new hearse*.

I am inclined to think the invoice or writing contains the terms of the bargain. Baker said he wanted it prepared as "the memorandum of the terms of sale," and he is not contradicted in that. Baker and Stone both say that Baker desired terms to be added to it, which were added, namely, the delivery of the hearse at the station; and that it should be finished and completed; and that he wanted the defendant to sign the invoice, and he was told it was not necessary, that the name at the top was as good as the name at the bottom.

But if the verbal bargaining is to be considered as well to be a part of the contract, it will not weaken the plaintiffs' case, in my opinion, in any respect.

The statement that the defendant had sold to the plaintiffs "one new hearse," was, I think, more than a mere representation; it was a warranty; and such a statement may be a warranty: *Allan v. Lake*, 18 Q. B. 560.

In *Budd v. Fairmaner*, 8 Bing. 48, a receipt was given, "Received of Mr. Budd, £10 for a grey four year old colt, warranted sound in every respect." It was held that the instrument confined the warranty to soundness, and that the age of the horse was not warranted also. That statement was considered to be a representation merely, for which no action would lie, unless it were known to be false. It was said the instrument was a receipt merely describing an antecedent contract; and it was held the word *warranted* being expressly confined to the soundness, excluded the idea of the age of the horse being also warranted.

That which is alleged to be a warranty must be shewn to have been stated for the purpose of its constituting a part of the contract: *Hopkins v. Tanqueray*, 15 C. B. 130, 142.

There are cases in which the question is properly for the jury—as in *Power v. Barham*, 4 A. & E. 473, where in a bill of parcels it was stated, "four pictures, views in Venice, Canaletto, £160"—to say whether the words were used as a representation merely, or matter of description, or as a contract that the paintings were by Canaletto.

And the surrounding circumstances are admissible in such case, to enable a jury to say whether there was a warranty or not: *Stucley v. Baily*, 1 H. & C. 405. This last case shews very clearly what is or is not a warranty.

In *Behn v. Burness*, 3 B. & S. 751, it is said a question may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract,—“This is a question of construction, which the Court and not a jury must determine”: per Williams, J., at p. 754.

Mr. Justice Williams also says, at p. 755, "If such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty."

That is the very point here, if the invoice alone be the contract. And even then, it appears to me to be a warranty, or to be capable of being held to be a warranty, according to the intention of the parties; and such intention may be ascertained by the surrounding circumstances; or to be a case in which the article stipulated for, a new hearse, has not been delivered.

Here it cannot be said the plaintiffs did not get the article they bought and inspected. So that the case must turn on the effect of warranty, or on the fact whether the defendant believed Baker to believe that he (the defendant) was contracting to sell a new hearse: *Smith v. Hughes*, L. R. 6 Q. B. 597.

In the latter case there would be no such contract, and the plaintiffs might have repudiated it. That they have not done, although they were at first desirous of doing it.

They got the very thing, in fact, they stipulated for and saw and examined; and the question is whether there was a warranty made at the time of its being a new hearse, as the plaintiffs alleged there was.

The rule of *caveat emptor* applies in such a case of inspection: *Jones v. Just*, L. R. 3 Q. B. 197.

We refer also to *Mody v. Gregson*, L. R. 4 Ex. 49.

We think, on the whole, it was a question for the jury, whether the defendant sold *his* new hearse,—calling it new simply as a matter of description, without any engagement that it was new in fact,—or whether he described it as a *new* hearse, and contracted to sell it as such.

And, in our opinion, the case should have gone to the jury on that point.

Rule absolute.

PRICE, ASSIGNEE OF MARVIN HOLDEN V. THE CATARAQUI
BRIDGE COMPANY.

Draw-bridge—Negligence in management of—Liability of lessor or lessee.

Defendants were incorporated to build a draw-bridge over a river, and authorized to take tolls; and their charter empowered them to let and farm the tolls. They leased the tolls accordingly, and the lessee covenanted to open and close the draw-bridge, and cause it to be properly attended to. The plaintiff's horses, while going down a hill, ran away and threw out the driver, and then ran on to the bridge. The draw had just been opened to let a vessel pass, and there being no bar or gate to close the bridge, the horses went over the opening into the water and were drowned. There had been gates there to close the bridge while the draw was open, but they had been broken about two months previously, and the new gates which had been made were not up. The jury found that gates would have prevented the accident, and that there was no negligence on the driver's part.

Held, that the plaintiff's right of action, if any, was against the lessee, and that defendants were not liable.

Per WILSON, J. The plaintiff was entitled to recover, though not against defendants. Per RICHARDS, C. J., and MORRISON, J. He was not entitled, for defendants would have done enough if they had had persons stationed to give warning when the draw was open, and they were not bound to have gates to stop runaway horses.

THE declaration contained four counts in different forms.

The substance of the different counts and complaints was, that the defendants were the owners of the Cataraqui bridge, on which they collect tolls, and on which there is a draw or swing for the purpose of being opened by defendants to allow vessels running on the Great Cataraqui river to pass through the bridge; and it was their duty to use every reasonable care in opening and closing the bridge, so as not to endanger persons or property crossing the bridge. And the defendants, knowing the draw or swing to be open, negligently and wrongfully suffered it to be open without any gate, guard, or other security or protection to teams, vehicles, or persons passing over the bridge; by reason of which the said Marvin Holden's horses, waggon, and harness, which were then lawfully crossing the bridge, fell from the bridge into the river, and the horses were drowned, and the harness and waggon damaged.

Pleas—1. Not guilty.

2. The horses, &c., were not Marvin Holden's, as alleged.

3. That the grievances complained of were caused by the improper conduct and negligence of the plaintiff, and not otherwise.

4. To the second and third counts, that it was not the defendants' duty to provide gates; and that the team at the time of the accident was not in proper charge, or in any person's charge.

5. That the swing was properly open: that the horses were running away, by reason of which, and not from the defendants' negligence, the horses ran into the opening.

6. In substance the same as the fifth plea, but alleging that the team, while running away, had no person in charge of it.

7. That Marvin Holden unlawfully and negligently drove his team on and over the bridge at an unlawful pace, contrary to defendants' by-law, and that the grievances complained of happened while Marvin Holden was engaged in these unlawful acts, and not from the negligence of defendants.

8. That one Luke Woods was, at the time of the accident, the lessee of the tolls of the bridge, and that he, by his lease, had to take charge of, and open, and manage, and close the draw or swing when necessary; and he was not there as the servant of the defendants.

Issue.

The case was tried before Richards, C. J., at the Kingston Assizes, in the Fall of 1873.

The evidence shewed that one William McEwan was, on the 20th September last, driving a pair of horses employed in drawing lumber for his employer, Marvin Holden. The horses got frightened while going down hill, and ran away. The driver was thrown out, and had his arm broken. The horses ran on without the driver. After running about a quarter of a mile they came to the bridge at the east end, and continued running on towards Kingston till they came to the draw bridge, which was open at the time, it having

been opened just before then to permit a vessel to pass through, and there had not been time to close it before the horses came and got in at the opening and were drowned.

It was said if there had been a bar or gates across the bridge, the accident would not have happened. Gates had been on the bridge, to close while the draw was open, but not for two months before the accident. They had been broken, and new gates were made, but they were not up when the accident happened. They were put on in an hour after it had happened. The bridge was said not to be safe without gates or a bar.

One of the witnesses said—"If any person had seized the horses by the bit, it would have prevented the accident, for both horses stood still for fully four or five seconds before they went in."

It also appeared the defendants had, before and at the time of the accident, leased the tolls to Luke Woods, who hired and paid the men who attended the bridge, and whose duty it was to open and close the draw (*a*); the draw was being closed when the horses fell in.

Another witness said—"The horses both fell on their knees when they came to the draw. They tried to save themselves, and stood for a second or two, and they tumbled into the water. The waggon and the force shoved them on."

Several objections were taken to the plaintiff's right of recovery, upon which leave was reserved to the defendants to move.

The jury found, that if there had been reasonable gates on the bridge at the time of the accident, the accident would have been avoided.

That gates strong enough to prevent the accident would not seriously have injured the horses.

That the driver was not negligent in driving from drunkenness or from any other cause.

(*a*) See the lease more particularly set out in the judgment, p. 320.

That as a matter of precaution it was reaasonable the company should provide and keep up sufficient gates to stop horses that were running away.

The verdict was for the plaintiff, and \$250 damages.

In Michaelmas Term, *Ewart* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved, or why a verdict for the defendants should not be entered, or why a new trial should not be granted, the verdict being contrary to law and evidence.

In Easter Term, *McKenzie*, Q. C., and *Britton* shewed cause. The defendants were incorporated by the 8 Geo. IV. ch. 12. The sections applicable to the case are 3, 4, 5, 16, and 21. The west end of the bridge is in the city of Kingston, and the east end of it is in the township of Pittsburgh. The swing in the bridge to permit vessels to pass through is nearer to the west than to the east end of the bridge. The swing was open at the time of the accident. A vessel had just passed through, and the swing had not been closed. The plaintiff contends the opening caused by the swing should have been protected by a guard of some kind to have prevented, and which would have prevented the horses, which ran away and which went into the opening, from being injured or lost by getting into the water. The defendants insist they were under no obligation to fence. And they say also that if they were the obligation does not extend to runaway horses. They say also that their lessee, not themselves, is the responsible person if any one is liable. But the defendants were in possession of the bridge. They had no power to lease it, although they could lease and had leased the tolls, and it was their duty to attend to the opening and the closing of the swing. A gate was formerly on the bridge where the plaintiff says the gate should be. It was stated to have been broken down by a runaway artillery horse. And the defendants had gates on the bridge at the time of the accident, ready to put up, but

which were not put up until after the accident. The jury found all the facts in favour of the plaintiff. They referred to *Hole v. The Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488; *Pickard v. Smith*, 10 C. B. N. S. 470; *Ellis v. The Sheffield Gas Consumers' Co.*, 2 E. & B. 767; *Gray et ux. v. Pullen et al.*, 5 B. & S. 970; *Blake v. Thirst*, 2 H. & C. 20; *McIntyre v. Buchanan*, 14 U. C. R. 581; *Lynch v. Nurdin*, 1 Q. B. 29; *Parnaby v. The Company of Proprietors of the Lancaster Canal Co.*, 11 A. & E. 223; *Marfell v. The South Wales R. W. Co.*, 8 C. B. N. S. 526; *Manley v. The St. Helen's Canal & R. W. Co.*, 2 H. & N. 840; *Robinson v. Bletcher*, 15 U. C. R. 159; *Indermaur v. Dames*, L. R. 1 C. P. 274; *Daniel v. The Metropolitan R. W. Co.*, L. R. 3 C. P. 216; *Daniels v. Potter*, 4 C. & P. 262; *Ridley v. Lamb*, 10 U. C. R. 354; *Burns v. Poulson*, L. R. 8 C. P. 563.

MacLennan, Q. C., supported the rule. There was no negligence established against the defendants. There was no duty shewn to rest upon them to have gates to close when the bridge was drawn. There would be a duty on them in certain cases, as on a dark night, to take some means to prevent accidents happening while the draw was open.

What is claimed here is, that the defendants should, at all times, keep on the bridge some physical obstruction of such extent and strength as to prevent runaway horses from getting into the opening when the bridge was open. The statute provides that the bridge must have side-rails, but there is nothing said in it of gates, or a guard of any kind, when the draw is open: *Shearman and Redfield* on Negligence, 3rd ed., secs. 4, 16, 25, and 36; *Titus v. Inhabitants of Northbridge*, 97 Mass. 258; *Saunders* on Negligence, 9.

The defendants are not liable in this action, because their lessee was in possession of the tolls and of the draw-bridge, and it was his duty, by the 7 Vic., ch. 60, to open and close the bridge.

The injury was caused by the running away of the horses, and not by the open bridge. The proximate cause was the escape and running off of the horses.

In addition he referred to the following cases : *Witherley v. The Regent's Canal Co.*, 12 C. B. N. S. 2; *Binks v. The South Yorkshire Railway and River Dun Co.*, 3 B. & S. 244; *Manley v. The St. Helen's Canal & R. W. Co.*, 2 H. & N. 840; *Cox v. Burbidge*, 13 C. B. N. S. 430; *Read v. Edwards*, 17 C. B. N. S. 245; *Fletcher v. Rylands*, 4 H. & C. 263; 1 Wms. Saund. 561, notes; *Winkler v. The Great Western R. W. Co.*, 18 C. P. 250; *Nicholls v. The Great Western R. W. Co.*, 27 U. C. R. 382.

WILSON, J.—By the Act of Incorporation, 8 Geo. IV. ch. 12, the defendants were authorized to build a good and substantial bridge, at least twenty-five feet in width, and of sufficient strength for the passage of artillery carriages and cattle of every description, having sufficient side-rails for the security of passengers, and a convenient footway for passengers, separated from the carriage way by secure railings. And the company shall make, in some part of the bridge, a draw-bridge or movable part, not less than eighteen feet in length, for the passage of all vessels, boats, and crafts of every description, and shall cause the same to be opened for their passage at all hours during the season of navigation without exacting any toll or reward.

The bridge and all dependencies are vested in the company, who may take tolls.

The company were empowered also to let and farm the tolls to persons willing to take them. And they were required to make the bridge so as to afford a convenient and safe passage over it, and to maintain it so as to be safe and commodious for the passage of travellers, carriages, and cattle; and if they did not do so the bridge was to be forfeited to the Crown.

By the 7 Vic. ch. 60, "The toll-keeper, or the person appointed to receive the tolls at the said bridge, shall hereafter

open the draw-bridge, which * * the company are bound to construct * * and for every neglect or refusal, the toll-keeper or person appointed to receive the tolls shall forfeit and pay to the party so detained, the sum of 25s. currency."

The company had, before the time of the accident, leased, demised, and to farm let "the tolls, revenues, profits, and incumbrances of and belonging to the bridge." The lessee covenanted to open and close the draw-bridge, and to cause it to be properly attended to, and the toll-gates also.

The company reserved to themselves the upper part, or room on the second floor of the toll-house on the bridge, with the privilege of passing through and making use of the lower room and fire-place in common with the lessee, contractor, or toll collector.

The lessee at the end of the term is to yield up and deliver to the company the possession of the bridge, toll-gate or toll-gates, and all and every their appurtenances, in like good order and condition, wear and tear only excepted. The company may, in case of forfeiture for non-payment of rent, "relet the bridge and tolls, &c." The company may "enter into and upon the premises hereby demised at all times, to examine and repair the same."

I am of opinion the defendants are not liable, that whatever responsibility there is rests upon the lessee of the tolls.

For railway injuries the action is always against the lessee when the road is under lease. So it must be if the tenant overflow his neighbour's land, or neglect to maintain fences. And so it would also be if a hole were on his land too near a highway, and some one using the highway was injured by the hole.

I do not see why the action should not also be against the lessee in this case of tolls.

The statute expressly authorizes the tolls to be farmed; and it expressly makes it the duty of such persons to close and open the gates. It became the duty of that person to

open and close them under all due precautions for the protection of life, limb, and property.

The bridge is not in so many words demised to the farmer of the tolls, but he has possession of the bridge, toll-house and appendages. He is to keep the bridge clean and free from dust, &c., and to deliver them up at the end of his term in like good order, wear and tear excepted.

The tolls could not be properly levied or farmed without the occupation of the toll-house—near the toll-gate—and the draw could not properly be opened and shut without a residence close to it, and without the most unlimited access to it at all times, night and day. The duties to be performed necessarily require the right of occupancy of the bridge and toll-house, and they demand that the farmer shall have the sole control of the toll-gate, and unqualified access to the draw-bridge, and to every part of the bridge. The company are to do the repairs.

The company have not expressly demised more than the tolls, but the lessee has all the toll-house excepting that part of it which has been reserved; and he has possession of the whole bridge and works as connected with and necessary for his farming the tolls with effect.

The lessee is a person having an independent right and interest to the defendants, and for many purposes to their exclusion. The defendants have done nothing improperly on their part, neither by themselves nor by any of their employees. Their lessee has not done his duty by attending to and using the gates properly. That is what the plaintiff alleges. The defendants say that is the business of the lessee, and not theirs.

If the fact be that there was a gate for protection when the defendants made the lease, that would shew more strongly the recourse should be had against the lessee.

But if the fact were that the defendants gave the bridge without any such protection, that omission on their part would not make them liable for this injury, because it does not follow if there had been gates that the lessee would have used them: *Walker v. Goe*, 3 H. & N. 395, 4 H. & N. 350.

In *Hole v. The Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488, the defendants were held liable for the bad construction of a bridge they were authorized to build by Act of Parliament, although the work was done by an independent contractor, because the statute required the defendants to build it, and what their workmen did they did. It was the very thing the defendants were to do by the statute, which they got the contractor to do for them, and the very thing they employed him to do he did badly; so it was the same as if it were the defendants' own act. But if in doing that work the contractor were guilty of negligence entirely beside the contract, he would alone be liable for it. *Gray ex ux. v. Pullen*, 5 B. & S. 970, is to the same effect.

In *Pickard v. Smith*, 10 C. B. N. S. 470, a railway company let refreshment rooms and a coal cellar to the defendant. The opening for putting the coals in, was on the company's arrival platform. A train came in while the servants of a coal merchant were shooting coals into the cellar for the defendant. The plaintiff, a passenger, while going out of the station, without any fault of his, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded. Held, that the defendant was liable; and per Williams, J., Semble, the company would also have been liable.

It was suggested the company were liable, not because they were lessors, but, as I understand the case, because the dangerous opening was on their arrival platform, and there was a duty upon them to maintain that safe and clear for their passengers.

In *Blake v. Thirst*, 2 H. & C. 20, commissioners let the making of a sewer to the defendant. He was not to sublet without the engineer's consent. The defendant contracted with N. by parol to do the excavation and brickwork, and the watching, lighting, and fencing, at a certain price, while he, the defendant, supplied the bricks and carried away the surplus earth. The defendant's name was on the carts and on a temporary office near the work. He did not interfere during the work, but he admitted he

would have dismissed N. if he had been dissatisfied with him. The clerk of the works was in the employment of the commissioners. The plaintiff fell into the sewer, which was not fenced nor lighted. Held, there was evidence for the jury of the defendant's liability. He had the right to control the way in which the work was to be done. I refer also to *Manley v. The St. Helen's Canal and R. W. Co.*, 2 H. & N. 840.

The conclusion I come to is, that the defendants are not liable for their tenant's wrongful act, done quite collaterally to the contract and not by or in obedience to it.

If the case had not gone off on this point, I should have been of opinion that the draw of such a bridge was a place of that dangerous nature, that it did require a fence or guard, or protection to it, to save persons or cattle from going into the gap and suffering damage or death.

It is a specially perilous place, and in my opinion the authorities show that some protection was required; and perhaps, too, at night a light should be added.

Marfell v. The South Wales R. W. Co., 8 C. B. N. S. 525, shews a gate between the company's main line, and a tramway they had on their ground, and allowed others to use, on paying toll, was necessary for safety. The plaintiff's horse, while on the tramway, got frightened by a railway train, and it swerved from the tramway on to the railway line, and was killed; and it was held the company were liable.

In *Barnes v. Ward*, 9 C. B. 392, the defendant was held liable for having an unprotected excavation immediately adjoining a public footway. *Daniells v. Potter*, 4 C. & P. 262, and *Binks v. The Yorkshire Railway and River Dun Co.*, 3 B. & S. 244, are to the same point.

The case last mentioned, and the two cases of *Manley v. The St. Helen's Canal and R. W. Co.*, 2 H. & N. 840, and *Witherley v. The Regent's Canal Co.*, 12 C. B. N. S. 2, are especially important, as they are canal cases in which an omission to guard or protect the public from injury from it, was considered and decided. In the first of these cases, the

company was held not bound to fence their canal as against the highway, because there was a strip of land between the highway and the canal, which did not make the canal dangerous, and although the public used the strip of land between the two, they had to take it subject to its condition and risk.

In the second of these cases, the swivel bridge over the canal was open, which left the end of the highway abutting on the canal wholly unfenced. The deceased, who was walking on the road, fell into the opening, and was drowned.

Channell, B., says, in *Manley v. St Helen's Canal and R. W. Co.*, 2 H. & N. at page 856, "If they have a right to make swivel bridges, there supervenes, on the statutory right, a common law obligation to accompany such a bridge with all necessary surrounding protection; and the jury have found they did not do so."

In that case, the want of some fencing or protection is treated as an act of negligence, giving a cause of action for injury suffered in consequence of such omission; but the action failed, because the deceased by getting on the bridge while it was being swung, and stepping back without thinking where he was, was guilty of contributory negligence.

I refer to *Sparhawk v. The City of Salem*, 1 Allen 30, and *Collins v. Dorchester*, 6 Cush. 396, as to lighting the highway at dangerous places; and to *Hyatt v. The Trustees of the Village of Rondout*, 44 Barb. 385, to shew that persons bound to maintain a bridge must repair, not only the floor, but must provide guards or railings if necessary for the safety or protection of the public. See also *Indermaur v. Dames*, L. R. 1 C. P. 274.

The rule is, that a highway should be safe and fitted for the public use. Anything upon the highway or so near to it as to be a cause of danger to the public using the highway, and from which damage results, gives a cause of action against the wrongdoer. I am of opinion the unprotected draw-bridge was dangerous to the public, and it should have been protected in some way so as to have made it

safe—just as fire must be guarded, or the escape of sparks from a railway engine, or a powder-mill, or coal oil, or anything else which is or is likely to be dangerous to the public safety.

It was said that none of the draw-bridges of any of the canals in the province are protected when they are open. That may be so, and yet precautions may be taken while they are open to prevent accidents. I do not, however, take the fact of omitting all precautions at these places as an argument against the general rule which governs in such cases where the public safety is concerned, but as a danger to be provided against in time before a misfortune happens to any one.

The other ground which was relied upon was, that although the defendants should have provided a fence and did not, so that they were in default in that respect, yet the protection of a fence was only to be given to those who were using the highway reasonably and with due care and caution, and that was not the case here; for it was said the horses had got from the control of the driver and ran a considerable distance till they fell in at the draw-bridge; and the defendants, as it was argued, were not bound to fence against runaway horses, for if they were they would be bound to fence in a manner and with materials strong enough to resist runaway horses, and it would be unreasonable to call on the defendants to fence against them, and to fence with that degree of solidity so as to resist them. An American case was referred to on the point, and there are several others to the like effect.

I have had to consider this line of argument in *Toms et ux v. The Township of Whitby*, ante p. 195, in which judgment has just been given, and the conclusion I have come to is, that the fact of the horse being a runaway, if it is without the fault of the rider or driver in any way, does not disqualify him from claiming compensation from any one for a defect in the highway which that person should have repaired, by reason of which damage has been sustained.

A person is not using the highway without due care

because his horse, by accident or by the wilful conduct of others, has become unmanageable. He is not a wrong-doer when he is only unfortunate. He should no more be killed by unguarded canals, or areas, or excavations, or by obstructions in the highway, because his horse has run off with him against his will, than if he were travelling along on foot the master of his own movements. The fact that it would be difficult to erect a strong enough fence to stop a runaway team is not a satisfactory reason for having no fence at all. Fences which answer in most cases will neither keep out nor keep in very unruly or mischievous animals, and a fence might be sufficient to stop most runaway horses, as much or perhaps more by the effect or appearance of its physical hindrance than by its actual power of resistance.

If it be proved in any particular case that no barrier, however reasonably strong it was made, would or could have stopped a runaway which was jumping over or breaking down all impediments, it may well be that the want of a fence might not alone be held to be a sufficient ground for damages, although the physical appearance of opposition, and the effect it might have, would also have to be kept in view. Here the horses were brought almost to a stand before they went off the bridge. One was pulling back and the other was rather pressing on. The least thing would probably have saved them; and the absence of a fence does appear, in this case, to have been the cause of the accident.

While I am in favour of the plaintiff upon the other points of his case, I am of opinion he has no claim against the defendants for the injury he has sustained. The rule, in my opinion, should be absolute for a nonsuit on both points.

RICHARDS, C. J.—I concur in the conclusion arrived at by my brother Wilson, that this action will not lie against the defendants. If it can be maintained at all, it must be against the lessee of the defendants.

As at present advised, I should think, under the circumstances of this case, an action would not lie even if the defendants had been in the occupation of the bridge, and liable for any negligence or want of care on the part of themselves or of their servants.

I think they would well discharge their duty to the public, if they had persons stationed on the bridge to give notice by signals or otherwise when the draw was open. I do not think they were bound to have gates there to stop passengers, and certainly not to stop horses that had run away and were without any control when they came upon their bridge.

If the question as to defendants' liability had not been raised on the ground that the bridge was leased to and under the control of another person, I think I should hold the facts proven at the trial failed to establish a case against them.

If the finding of the jury would be considered as embarrassing in an action against defendants, I think a new trial should be granted.

As we all agree that the rule must be absolute to enter a nonsuit, the rule will go to that effect.

I think it better, however, to state my impressions as to the right of the plaintiff to recover against the defendants or the lessee of the bridge, to avoid any misapprehension in case another action should be brought.

MORRISON, J., concurred with the Chief Justice.

Rule absolute for nonsuit.

BROWN V. BEATTY ET AL.

Injury to plaintiff's boat by collision—Action for—Measure of damages.

In an action for injury to plaintiff's vessel caused by collision with defendants' steamboat: *Held*, that the plaintiff was entitled to recover the costs of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, or for the profits which he would have earned by her employment.

Seemle, that in an action of trover for a vessel, the loss of profits may be recovered.

ACTION for negligently injuring plaintiff's steamboat, the "William Hall," by the defendants' steamer "Manitoba," while the plaintiff's steamer was lying at the harbour of refuge at Southampton in Lake Huron, whereby the plaintiff was put to expense in repairing his boat, and lost the use of it for a long time and the profits he would have made.

Plea, not guilty.

The cause was tried at Sarnia, at the last Spring Assizes before Morrison, J., without a jury.

It appeared that the plaintiff's steamboat, the "William Hall," a tug, was lying at the wharf at Southampton, when the defendants' vessel, the "Manitoba," a very much larger boat, came up, and not slackening speed in time, ran into her stern, disabling her, and doing serious injury. The tug was waiting at the time for a raft of timber belonging to the plaintiff, which she was about to tow down to Lake Erie, for some public works which the plaintiff was executing there as a contractor for the Government. The plaintiff immediately hired another tug, the "Martin," to take her place, and the "William Hall" was taken to Port Huron, where she remained several days undergoing repairs.

The verdict was for the plaintiff, and damages \$818, being :—

For repairs	\$303
Hawser	15
Damage to vessel, or deterioration of vessel...	500

The plaintiff's counsel contended that the plaintiff was entitled in addition to the sum paid by him for four days and some hours hire of the tug "Martin," towing, at \$150 a day, while the plaintiff's boat was disabled\$643 12
 And to a hawser for the purpose..... 125 00

 \$768 00

Also for 13 days' loss of vessel—that is, profits of
 the vessel while repairing, at \$50 a day\$650 00
 And wages of the men during that time at \$20 a day 260 00

 \$1678 00

In Easter Term last, *Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be increased by the sum of \$768 made up as above stated, and the sum for wages, and the sum charged for the loss of the profits while her repairs were being made, or by such other sum as the Court might think right.

M. C. Cameron, Q. C., for defendants, also obtained a rule calling on the plaintiff to shew cause why the verdict should not be reduced by the sum of \$573, or such other sum as to the Court might seem just, or why the verdict should not be set aside and a new trial granted, the verdict being contrary to law and evidence.

In this term, *McMichael*, Q. C., shewed cause to the plaintiff's rule and supported defendants' rule. The rule in the Admiralty Court is not to allow the owner of the injured vessel for loss of profits; *The Commerce*, 3 Rob. Adm. 287; *Shearman & Redfield*, on Negligence, 3rd ed., 681, sec. 599.

The "William Hall" lost no profits; she was employed in the plaintiff's own business, and while she was laid up the plaintiff put on another vessel in her place. The wages are also objected to and the sum of \$500 for the permanent damage done to the ship. The repairs, \$303, are not objected to, but the sum paid for the hire of another vessel cannot be allowed. This last item is part of the claim of \$768.

Robinson, Q. C., supported his own rule and shewed cause to the defendants' rule. The \$500 for permanent damage to the vessel,—that is, the difference between her value just before the injury, and her value just after the repairs were made,—was a moderate allowance. The plaintiff should be allowed what the "William Hall" would have earned if she had not been injured, during the time she was under repair, and also the wages of the men during that time. They could not be discharged for that short time. They had to be kept on, for they could not have been got again at that season when wanted, if they had been discharged, and they were employed in the repairs. Their expenses were a part in fact of the repairs, and should have been added to the \$303. This charge must be allowed either as wages or as repairs.

Damages above the value of the goods may be given in trover: *Davis v. Oswell*, 7 C. & P. 804; *Bodley v. Reynolds* 8 Q. B. 779. The case of *Hughes v. Quentin*, 8 C. & P. 703, which was referred to at the trial, was thought to be against the plaintiff. It is an authority for allowing the item of wages; and so far as it is against allowing for the hire of another vessel, it is clearly opposed to the later cases.

The profits lost should also have been allowed. They were more than \$50 a day considerably. That sum is a very moderate allowance, and they should be allowed at that rate at the least. This sum, and the sum paid for the hire of the tug "Martin" in place of the plaintiff's boat, was not a speculative claim, but an actual ascertained and indisputable demand, and the authorities seem conclusive in favor of its recovery. In *Shearman & Redfield*, on Negligence, 3rd ed., sec. 599, it is said that the earlier decisions were opposed to any allowance for loss of profits: "But later decisions expressly allow the recovery of profits where they would, to a reasonable certainty, have been earned had not the injury occurred. In Great Britain, New York, and Connecticut, the allowance of profits is a settled rule." In *Sedgwick*, on Damages, 6th ed., 577, note.

it is said, "The rule in England broadly allows profits;" and this rule is not confined, or said to be confined, to the Admiralty Courts. *Heard v. Holman*, 19 C. B. N. S. 1; *The Yorkshireman*, 2 Hagg. 30, note; *The Gazelle*, 2 Rob. Adm. 279, 10 Jur. 1065; *The Matchless*, 10 Jur. 1017; *Shelbyville Lateral Branch R. W. Co., v. Lewark*, 4 Ind. 471; *The Lake*, 2 Wall. Tr. 52; *The Rhode Island*. 2 Blatch. 113; *The Narragansett*, Olcott 388. The three claims, wages, profits, and the hire paid for the other vessel, should be added to the damages that were assessed. See also *Parsons on Shipping and Admiralty*, vol. i., 538, 544.

WILSON, J., delivered the judgment of the Court.

In *Mayne on Damages*, 2nd ed. 296, it is said "In trover for carpenter's tools, where the declaration stated that the plaintiff was prevented from working at his trade, £10 above the value of the tools was given: *Bodley v. Reynolds*, 8 Q. B. 779." It was said that where special damage is laid and proved there can be no reason for measuring the damages by the value of the chattel converted.

The damage laid was by means whereof the plaintiff was prevented from working at his trade, that is, in fact, it appears to me, from the profits he would have made by his tools if the defendant had not converted them.

In *Davis v. Oswell*, 7 C. & P. 804, in trover for a horse, the plaintiff was allowed to recover for the hire of other horses to do his work, when it is laid as special damage. The plaintiff it was said should recover the value of his horse when converted, and the sum he paid for hiring other horses, less the expense of keeping his own horse for that time.

In *France v. Gaudet*, L. R. 6 Q. B. 199, the plaintiff bought champagne lying at the defendant's wharf at 14s. per dozen, and resold it at 24s. to the captain of a ship about to leave England. The defendant refused to deliver the wine, and the plaintiff was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. The defendant had no knowledge of the sale or purpose for

which the plaintiff required delivery of the champagne. In an action for conversion, it was held that the plaintiff was entitled as damages to the price at which he had sold the champagne.

Mellor, J., in giving the judgment of the Court, said, that the value of the wine when it was converted was 24s. per dozen, and the plaintiff was therefore entitled to recover such value.

But when special damage is claimed as in the above case for the detention of tools, there should be notice given to the defendant, or it should arise out of the circumstances of the case, that inconvenience beyond the loss of the goods would be occasioned to the plaintiff.

In *Hughes v. Quentin*, 8 C. & P., 703, which was a case for negligent driving whereby the plaintiff's horse was injured, the plaintiff's horse just before the accident was worth £40. For six weeks after the horse was kept at a farrier's, for the purpose of being cured, and at the end of that time the horse was permanently damaged to the extent of £20.

The plaintiff claimed to recover, in addition, the expense of hiring another horse in the mean time.

Lord Abinger ruled against it. He said the proper charge was the "keep of the horse at the farrier's, * * the farrier's bill, and the difference between the value of the horse at the time of the accident and at the end of the six weeks."

These cases shew that the plaintiff is entitled to the repairs, which was not disputed, and to the \$500 the permanent injury, and the wages of the men necessarily kept over.

The case of *Davis v. Oswell*, 7 C. & P., 804, is against *Hughes v. Quentin*, 8 C. & P. 703, as to the hire of another. It does not appear in the latter case such a claim for special damages was laid, as in the former case. The former was trover, the latter was a case of collision.

Why a person whose horse has been injured so that he cannot use it, and whose business requires he should have a horse while his own is unfit for work, cannot recover the

sum he has had to pay for the hire of the horse he has had to engage, is not plain to my apprehension.

Getting back an inferior horse, although with compensation for the deterioration, is no compensation for the benefit or use he would have derived from his own horse if it had not been for the defendant's fault.

In the Admiralty Court it is well settled that ascertained or well assured profits, or profits in the course of being earned at the time of the collision, are recoverable against the vessel in fault: *Heard v. Holman*, 19 C. B. N. S. 1; *The Clarence*, 3 Rob. Adm. R. 283.

In the case of a total loss, nothing in the way of demurrage or being prevented from earning freight is recoverable in the Admiralty Court: *The Columbus*, 3 Rob. Adm. R. 158.

If this were an action for trover, I think that on the authority of the above cases, and because the defendants must have known the plaintiff was profitably using his vessel in the course of his business, they would have been liable for the loss of profits, or in being prevented from earning freight.

At law, as distinguished from the admiralty practice, in a case of collision, such as this was, I think demurrage, or the being prevented from earning freight, is not recoverable according to the decided cases.

The plaintiff, in addition to his present verdict, is entitled to the wages.

But we think not to the hire of another vessel, nor to the loss of freight.

MORRISON, J., concurred.

RICHARDS, C.J., not having been present at the argument, took no part in the judgment.

Plaintiff's rule absolute to increase verdict accordingly. Defendants' rule discharged.

WILLIAM SOULES V. DANIEL SOULES.

Executor—Promise to pay legacy—Possession of assets—Pleading—Administration of Justice Act, 1873.

The declaration alleged that one S., by his will, appointed defendant his executor; and after devising his farm, directed his remaining real estate to be sold and the proceeds thereof and his money and notes to be equally divided between his three sons, of whom plaintiff and defendant were two; that defendant proved the will and became possessed of assets more than sufficient to pay plaintiff's claim under the will, and properly applicable to the payment thereof, and afterwards promised and agreed with the plaintiff that the plaintiff was entitled to receive from him \$500, and stated that sum as the plaintiff's claim under the will; and thereupon, in consideration of the premises, defendant promised the plaintiff to pay, and the plaintiff agreed to accept, the said sum of \$500 as and for his claim. Defendant pleaded that he did not become possessed of assets, and that he did not promise; and the jury found in his favor on the first plea.

Held, 1, that the plaintiff's claim was not "a purely money demand," to which his right was an equitable one only, under sec. 2 of the Administration of Justice Act, 1873; and if it were, that that section, which did not take effect till 1st January, 1874, would not apply to this action begun on the 11th December, 1873.

2. That the allegation of defendant having assets was material, and the verdict on the first plea was therefore a bar to plaintiff's recovery.
3. That the possession of such assets was put in issue by the denial of the promise as alleged,—*i.e.*, of the promise having been made in consideration of the premises.

Semble, under the facts stated in the case, that the count should have averred a tender of a release or a readiness and willingness to execute it.

DECLARATION: that one William Soules on or about the 19th of August, 1868, made his last will and testament in writing, and thereby nominated and appointed the defendant and one Thomas D. McConkey executors thereof, and thereby, amongst other things, the said William Soules, after disposing of his farm, being parts of lots 27 and 28 in the fourth concession of the township of East Gwillimbury, did will and bequeath his remaining real estate property as follows, "to be sold after my death, and the proceeds of sale to be divided in the following manner: "First, I give to my sister-in-law Susannah Soules, widow of my late brother Peter Soules, deceased, \$75, and the remainder to be equally divided between my three sons Daniel, William," (who is the plaintiff,) "and John Soules, or their heirs or assigns; and as to my money and notes my executors shall collect and equally divide between my sons Daniel, William,

and John as soon as conveniently be done, provided it must not exceed one year after my death." And the testator afterwards died on or about the 20th of September, 1868, without having altered or revoked his will. And the defendant before the making of the promise hereinafter mentioned, to wit, on or about the 9th of December, 1868, proved the said will, (the said McConkey having renounced all his right to probate thereof,) and the defendant took upon himself the burthen of the execution thereof, and as executor of the will became possessed of assets of the estate of the testator more than sufficient to pay the plaintiff's claim under the said recited portion of the will, and properly applicable to the payment thereof. And the defendant after becoming possessed of such assets assented, promised, and agreed to and with the plaintiff that the plaintiff was then and there entitled to have and receive of and from the defendant the sum of \$500, in full satisfaction of the plaintiff's said claim, under the said recited portion of the will, and without reference to any claim of the plaintiff under any other portion of the will. And the defendant stated the said sum of \$500 due by the defendant as and for the plaintiff's said claim under the recited portion of the will. And thereupon, in consideration of the premises, the defendant did promise and agree to and with the plaintiff to pay the plaintiff the said sum of \$500 as and for his said claim under the recited portion of the will and the plaintiff then and there agreed to accept the said sum in full satisfaction and discharge of his said claim; and all conditions were performed, &c., but the defendant did not pay the same.

Second count, for money received by the defendant for the use of the plaintiff, and on an account stated between the parties.

Pleas, 1. To the first count: that defendant did not become possessed of assets of the estate of the testator more than sufficient to pay the plaintiff's claim applicable to the payment thereof.

2. To the first count: that defendant did not promise and agree as alleged.

3. To the first count : that defendant did not state the sum of \$500 due for the plaintiff's claim as alleged.

4. To the second and third counts : that defendant never was indebted.

5. To the second and third counts : payment.

Issue.

The cause was tried before Hagarty, C. J. C. P., at Toronto, at the last Spring Assizes.

The plaintiff was examined, and said, "I don't know the value of the loose property. I could not get a correct account. I often tried to get a settlement. Last May we came together. He agreed to give me \$500. That was for the loose property. I wanted \$650. Mr. Morgan, the defendant's lawyer, who objected to the arbitration bonds drawn between us, asked me if I would not take less. I refused. We came to \$500. Defendant pressed me to take less. He wanted me to put \$250 only in the writings and take the rest as a present, as he said he would then have to give his brother John \$500. After this we met in presence of Dudley (the plaintiff's lawyer,) and Morgan (the defendant's lawyer); the defendant then agreed to pay me \$500. I said I wanted some money to bind it, he then gave me \$4. There was to be a writing prepared by Morgan, he to give me \$250 cash, and the rest in two or three weeks. It was to be concluded next morning. Next morning we met, but Morgan was not at home. All was settled the night before except the writing. Defendant said it was all right, I need not put myself to trouble. Two or three days after defendant said he had altered his notion and would not do it. He has never paid me."

Cross-examination: "I have received previous sums, \$300 or \$400, out of the estate from defendant before this settlement; an account was given to Dudley my attorney. The paper produced I found on the floor, I suppose defendant dropped it. I would shew it to defendant after he paid me the \$500, so I told him. He said he would pay the \$500 if I would shew him the papers afterwards. I never shewed them to him. I said there were papers shewn; there were

many notes of the estate. "I did not say he had been paid them. I told him I had papers. He wanted to know what papers I had. I said that was my business. I said I would shew them to him after he paid me. I saw an account in 1872. I never saw any account till it was placed in the lawyer's hands. Before I consulted Dudley defendant shewed me the books with Graham. I can't read writing. Graham looked at them. Account produced of October, 1871, shews the balance of estate in executor's favour, \$96.62 There has been property in Barrie sold since then. Defendant and I did not go into any account at all to shew what was due to me."

Re-examination: "When Graham was there defendant promised to make out the account from the book, and Graham could tell me. He did not do so. He was to pay me \$250 before the writings were drawn, and the residue in two or three weeks after the writings. Since then he has offered me \$300: that was two weeks ago. For that I was to sign off my claim against the estate except the farm."

Mr. *Dudley* said the Barrie property was said to have been sold for \$500 or \$600, and that he understood all had been got in, and no other account was shewn than the one which shewed a balance due to defendant.

He corroborated the plaintiff generally as to the defendant's promise to pay plaintiff the \$500, but he said that the defendant also said the plaintiff's share would not be \$250.

That was the case for plaintiff.

The defendant's counsel raised certain objections by way of nonsuit. Leave was reserved to him to move upon them.

For the defence the defendant was examined, as follows: "I went to Dudley's about the arbitration. Dudley suggested we should settle. He asked me what I would give. I referred him to the account, which was correct to a cent. Dudley said he had papers, my own papers, or received from Mr. Blake. Dudley said he had papers to shew from \$600 to \$700, but he would take \$500. I took plaintiff out, and we talked. He allowed he had papers shewing I

had collected moneys unaccounted for. He would not tell what they were. He spoke of large notes he said I had collected. I said, that being the case I'll make you a present of \$250, and pay him \$250 if he would shew me the papers, and if I shewed him they were wrong he would refund to me what I shewed wrong. I said there was not a bit of truth in it. We came back to the office. I did not absolutely promise him then or ever anything. He asked me to give him enough to pay for the arbitration bond which had been drawn, and I gave it to him in the office. I referred then to the papers being produced. I told him I was to pay \$250 as a present, and \$250. I said, it would be more correct to say \$350 as a present, as I could shew him it was all wrong. A release was to be drawn releasing everything excepting the homestead. He was specially to shew me the papers. That was on Friday. Next Tuesday plaintiff and I met at Morgan's. I spoke of plaintiff producing the papers. He said he would shew them when the proper time came. I asked him to shew them. He refused. I said then I would arbitrate with him, and have the matter investigated. On this bonds were signed. He declined to shew the papers. He said he had a paper I would admit having had in my pocket book. I urged him to arbitrate or do what we had agreed to. I had told him there would not be \$150 for his share. No such sum was then in my hands after collecting all in. There were assets then not collected, one item \$216, another \$50. There were debts still unpaid. Since then I have paid \$60 or \$70. I rendered an account through Blake, Kerr & Wells, my lawyers. Before that, at different times I shewed him how the accounts stood. He brought David Graham to me to see the books. Graham came several times. I never refused information to plaintiff. I said Graham could have the books and papers at any time. A letter, produced, 8th October, 1868, written by John W. Soules to David Soules, speaks of notes. Not a cent to my knowledge has been received by me that I have not entered and accounted for. There was no such sum coming to the three of us as plaintiff claims from me.

Cross-examination: All the notes were collected by Lount, Boys & Co., Barrie. I can't tell the amount or number of notes. I think they collected \$700 or \$800. I have an account at home, but did not understand the accounts would be gone into here. I collected hardly anything except on notes, perhaps a little rent. The account shews the moneys received from Lount & Boys. The account is made from books at home. I compared the accounts produced with the books. Since the account I received about \$49. I also received \$300 from Barrie property, also \$200 from it. I have no notes or mortgages uncollected. Don't think there is a note worth anything uncollected. I have paid plaintiff from \$450 to \$460 on account of his share. After Dudley suggested \$500 plaintiff and I went to talk privately. I wanted to know as to the papers hinted at. Mr. Dudley hinted he had papers to shew I had what plaintiff claimed. I thought Dudley was prevented by plaintiff from telling me. I asked plaintiff what he meant by "them papers." He said he would shew by papers from the office of the Clerk of the Court as to notes I had collected. He would give me no satisfaction. I made the agreement with him on the impulse of the moment. I had the idea that what I could prove to be incorrect I could get back from him. I think \$250 was to be in the receipts. I am not positive. Plaintiff agreed to take it as I suggested. Something was said of it in the office when we returned. I considered we perfectly understood each other. The \$4 was not given as earnest to bind the bargain: nothing said of that. I supposed I would get credit for it. In the office the plaintiff said he hoped I would shew it was wrong."

Mr. *Morgan* was also examined. He said the parties said they had settled after talking between themselves, \$250 to be paid down and \$250 in two or three weeks. The last sum defendant said was to be treated as a gift, as he did not consider he owed that; that the plaintiff was to shew him he had collected assets not accounted for, and the plaintiff was to return to him any amount over and also

the actual amount coming to him. He did not understand there was any special condition attached to the settlement. The defendant did not admit he had \$500 in his hands going to plaintiff. Witness was to draw a release from plaintiff to defendant to cover everything but the farm collected or uncollected. This was on a Friday. On Tuesday after the parties met at the witness's office. Defendant asked for the papers. Plaintiff would not produce them—not till defendant settled. Defendant said if plaintiff would not produce them, it must go to arbitration. Witness asked plaintiff if that were so, he declined to answer and left the office, and witness did not draw the release.

Cross-examination : Witness said, there was an agreement concluded on the Friday.

The learned Judge left it to the jury to say whether there was an absolute promise as alleged to pay the \$500, or was it, as defendant insisted, a conditional agreement, not to pay absolutely, but to pay \$250 on being shewn the papers, which were never shewn, and the other \$250 in two or three weeks thereafter. He said there was no evidence to impeach the defendant's accounts on the first issue, and it should be found for him; that the defendant's case was that the plaintiff and Dudley, the former especially, gave the defendant to understand the plaintiff had got or found certain papers shewing defendant to have received large assets other than he had accounted for, and he bargained that these papers should be shewn him before he paid the first \$250; that he was to pay \$250 in two or three weeks: that the legal difficulty was for the Court—was there any consideration for the promise, if there were no assets as alleged. Was it or is it not *nudum pactum*?

The jury found a verdict for defendant on the first issue, and for the plaintiff on the other issues, and they assessed the damages of the plaintiff at \$500.

In Easter Term last *Harrison*, Q. C., obtained a rule calling on the defendant to shew cause why judgment should not be entered for the plaintiff notwithstanding the

finding for the defendant on the first issue, or why such other rule or order should not be made as to the Court might seem proper.

And *J. K. Kerr* obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial, or why a new trial should not be had, on the ground that the verdict was contrary to law and evidence and against the weight of evidence, and contrary to the Judge's charge.

In this term *Harrison*, Q. C., shewed cause to the defendant's rule and supported his own rule. The plaintiff's claim comes under the Administration of Justice Act, 1873; it is "a purely money demand" under the second section. Assets on hand form a good consideration for a promise by the executor to the legatee to pay the legacy: *Trewinian v. Howell*, Cro. Eliz. 91; *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, *Ib.* 289, 293; *Reech v. Kennegal*, 1 Ves. Senr. 125. The assets are alone alleged in the first count as the foundation of and the consideration for the promise, but there were other matters, forbearance and a settlement of litigation, which were shewn by the evidence to have been and to have formed the consideration for the defendant's promise, and the count may be amended to meet such a case: *Parsons v. Alexander*, 5 E. & B. 263; *Fraser v. Hickman*, 12 C. P. 213; *Petrie v. Tannahill*, 22 U. C. R. 608; *Rainy v. Bravo*, L. R. 4 P. C. 287; for these matters would alone constitute a good consideration for the defendant's promise: *Davis v. Reyner*, 2 Lev. 3; *Bradley v. Heath*, 3 Sim. 543; *Goring v. Goring*, Yelv. 10. The promise of an executor to pay a legacy is alone evidence of an account stated: *Roper v. Holland*, 3 A. & E. 99; *Bartlett v. Dimond*, 14 M. & W. 48, 56; *Pardoe v. Price*, 16 M. & W. 451, 458; *Edwards v. Lowndes*, 1 E. & B. 81, 89; *Topham v. Morecraft*, 8 E. & B. 972, 983. The promise is therefore not *nudum pactum*. The defence here is in effect nothing but that the defendant has fully administered, and in this action that is no defence: *Trewinian*

v. *Howell*, Cro. Eliz. 91 ; *Hawkes v. Saunders*, Cowp. 289 ; *Wasney v. Earnshaw*, 4 Tyr. 806 ; *Gregory v. Harman*, 1 M. & P. 209. There can therefore be no nonsuit, and the plaintiff's rule should be made absolute to enter judgment *non obstante veredicto*.

J. K. Kerr supported his own rule, and shewed cause to the other. The evidence does not shew the defendant ever promised to pay the \$500 absolutely. It was a conditional promise. The defendant denied expressly throughout, and that is nowhere contradicted, the having assets to meet any such claim. He engaged to pay \$250 on proof by the plaintiff that he, the defendant, had collected more of the assets of the estate than he had accounted for, and another sum of \$250 in two or three weeks afterwards. The plaintiff never gave such proof, and the jury found as a fact that there were no assets. An action at law will lie for a specific legacy on a promise to pay it with assets, but no such action will lie for a share of the general residuary assets of the estate : *Williams* on Executors, 7th ed., 1931. The allegation of assets is necessary in every such action to maintain it : *Deeks v. Strutt*, 5 T. R. 690 ; *Holland v. Clark*, 1 Y. & C. 151, 166 ; *Jones v. Tanner*, 7 B. & C. 542 ; *Cadbury v. Smith*, L. R. 9 Eq. 37.

WILSON, J., delivered the judgment of the Court.

If this be "a purely money demand" to which the plaintiff's right is "an equitable one only," under the second section of the Administration of Justice Act, 1873, I am of opinion the plaintiff cannot maintain it upon his present writ, which was issued on the 11th of December, 1873, while that section of the Act did not take effect till the 1st of January, 1874. See section 64 of the Act.

The plaintiff has not professed to sue for a purely money demand ; the whole frame of his count is drawn to state and recover, as it is in fact, a legal and not an equitable claim.

The question first to be considered is on the plaintiff's rule. Is he entitled to have judgment, *non obstante veredicto*

for the defendant on the first issue, entered for him on the first count ?

That question depends upon whether the count would be sufficient in law if the allegation of the defendant having become possessed of assets more than sufficient to pay the plaintiff's claim out of the personalty of the estate, and which were properly applicable to the payment thereof, were struck out.

The count states that after the defendant became possessed of such assets he assented, promised and agreed to and with the plaintiff that the plaintiff was then and there entitled to have and receive from the defendant the sum of \$500 in full satisfaction of his claim under the recited portion of the will; and thereupon "in consideration of the premises" promised the plaintiff to pay him the said sum of \$500.

As the count is drawn it is grounded expressly upon the possession of assets by the defendant properly applicable to the payment of the plaintiff's demand, and upon the defendant's promise to pay it.

These two facts were put in issue under the allegation "in consideration of the premises" that the defendant did not assent, promise, and agree, as alleged: *Wasney v. Earnshaw*, 4 Tyr. 806, 809, 810; *Bell v. Welch*, 9 C. B. 154; *Carr v. Tannahill*, 31 U. C. R. 201, 212; *Thompson v. Hopper*, 6 E. & B. 172, 191.

The same plea put in issue all the material facts which constitute "the premises," besides the two matters just mentioned. The first plea, which denied the possession of assets, and the third plea, which denied the statement of the \$500 as due to the plaintiff, were strictly not required.

The fact that all the matters together constituting "the premises" were traversed by the general denial of the promise and agreement alleged, shew that the plaintiff must clearly make out that the possession of assets, traversed as well by the special as the general plea, was and is a wholly immaterial allegation, and that the failure of the plaintiff to prove it still leaves in his favour established by the verdict a sufficient cause of action or consideration for the

promise to entitle him to the general verdict, and to authorize the Court in holding them as to that fact to be wholly immaterial.

The mere possession of assets, nor I presume the admission by the executor of such assets, sufficient to pay a legacy, or all legacies and other claims, will not without an express promise to pay such legacy entitle the legatee to sue at law for it: *Deeks v. Strutt*, 5 T. R. 690.

That express promise may arise as well when the executor appropriates a sum for the legatee and admits that he holds it to be paid to the legatee, as when he says in so many words "I promise to pay it to you": *Edwards v. Lowndes*, 1 E. & B. 81, 89.

Or it may equally arise if the executor expressly state an account with the legatee and acknowledge that he has a fund in hand applicable to the claim made on him: Per Wightman, J., in *Topham v. Morecraft*, 8 E. & B. 972, at p. 983; or as it is stated in the same case by Erle, J., at p. 983, if an executor were to state to the legatee "I have in hand the sum which you claim, and hold it for you," that would give a cause of action against the executor at law.

The reason is, that the possession of the money by the executor which of right belongs to the legatee, and his declaration or admission that he has appropriated it or holds it for the legatee, has changed their former characters of executor and legatee or trustee and *cestui que trust*, and made them as an ordinary debtor and creditor toward each other.

If it require a promise to pay, an express promise or one necessarily to be implied from the words used or the acts done, how can it be said that the defendant would have made that promise if he had not been in the possession of assets sufficient to enable him to pay the amount which was claimed?

The possession of assets, besides, seems an essential ingredient necessary to create a liability against the executor when no other consideration is stated.

The having assets was the consideration alleged for the

promise in *Trewinian v. Howell*, Cro. Eliz. 91, to sue for the legacy.

So also in *Atkins v. Hill*, Cowp. 284, and *Hawkes v. Saunders*, Cowp. 289.

In these two last cases it is stated and it appears that the statement of assets was an essential allegation to sustain the action upon the promise laid.

In *Gregory v. Harman*, 1 M. & P. 209, a share of the residuary estate was held to be recoverable, it having been stated at a specific sum and the plaintiff having agreed to leave it with the defendant on loan. There assets also were averred.

In *Jones v. Tanner*, 7 B. & C. 542, it was said that a residuary share could not be sued for at law. There the defendant was not liable at all, for he was not the representative of the intestate, and it does not seem very clear, if the residuary share is ascertained to be and reduced to and agreed upon at a specific sum, why it should not be recoverable at law in the like case and under the like circumstances as a specific legacy.

In *Wasney v. Earnshaw*, 4 Tyr. 806, assets also were averred, and there it was held the defendant could not plead *plene administravit* against his personal promise to pay on condition of the money being left in his hands as a loan.

It is also expressly stated there that "in consideration of the premises" referred to all the antecedent matters—that there was money to pay all the legatees, and having paid them all but the plaintiff he had money remaining sufficient to pay him.

In *Davis v. Reyner*, 2 Lev. 3, the consideration stated was forbearance to sue.

In *Bradly v. Heath*, 3 Sim. 543, the consideration was also forbearance to sue.

All of these cases shew, and the reason and nature of the thing are in accordance therewith, that there must be a consideration stated for the promise, as the holding of assets applicable to the particular claim and an appropriation of them or engagement to hold them for that claim, or an

express promise to pay the claim, or a forbearance or a loan of that claim to the defendant; and that the mere fact that there are funds applicable but not appropriated to the claim "does not alter the character of the funds, and is not enough to give any legal remedy:" Per Rolfe, B., in *Pardoe v. Price*, 16 M. & W. 461.

Cadbury v. Smith, L. R. 9 Eq. 37, shews the necessity there is for an admission of assets in such cases.

I have no doubt, therefore, that the allegation of assets was a most material averment; and that upon that allegation the promise to pay was and is founded; and that the verdict should stand for the defendant on the first issue.

In truth the second and third issues should have been found and entered for the defendant as well as the first; for as to the second issue, if there were no assets, the defendant did not promise as alleged; and as to the third issue, he did not state the sum of \$500 to be due for the plaintiff's claim, if by that is meant that he (the plaintiff) was then and there entitled to have and receive that sum from the defendant out of the assets in his hands; because he could not have done so, as there were no assets as the basis of that allegation; and if the count do not mean what I have stated, it means nothing.

There was no claim proved on the common counts. There was no other claim than the one under the special count; and the facts proved shewing a want of assets, there was no consideration whatever to support the account stated.

I am not at all disposed to allow of an amendment by changing the consideration. I do not think the defendant ever fairly or voluntarily stated anything or promised anything. Whatever he did state or promise was by reason of hints, as he calls them, or by threats as they might more properly be called, that larger collections could be established against him by his own papers, which had in some way got into the plaintiff's possession, than he had accounted for; and which papers he desired to see, but which both the plaintiff and his attorney withheld from him, and

refused expressly to shew him until he had settled with the plaintiff; and then, of course, it would be quite too late to make any beneficial use of them.

And now it turns out that these papers contained only a list of notes to be collected, all of which had been already collected and duly accounted for.

I am disposed to think, also, upon the plaintiff's own evidence, that he should, in the special count, have averred a tender of release, or at least a readiness and willingness to execute it; and on the common counts, that he should have given proof of one or other of these facts.

The plaintiff, by suing, made that a condition precedent on his part, just as a vendor makes the averment of readiness and willingness to execute a conveyance a condition precedent on his part, when he sues for the purchase money or damages for non-performance of the contract, although the vendee is the person bound to make and tender the conveyance to the vendor for execution.

Here the release would have to be prepared by the plaintiff, and there is greater reason, therefore, why he should have made such an allegation or offered such proof. In my opinion the defendant is entitled to have his rule made absolute for a nonsuit, which is the extent of the leave reserved; or, if the defendant desire it, to discharge his rule altogether, leaving his verdict to stand on the first issue, and for the plaintiff on the other issues.

But, strictly, the plaintiff cannot have judgment on the three counts, when only one cause of action was proved.

Or if the defendant prefer a new trial, he ought to have it without costs.

The plaintiff's rule is now discharged, and the defendant will elect which of these three ways of disposing of his rule he will take. Election to be by 22nd September. If no election, rule to be absolute for a nonsuit.

Defendant having failed to elect.

Plaintiff's rule discharged.

Defendant's rule absolute.

CARRICK ET AL. V. SMITH.

Mortgage—Certificate of discharge—Form of.

A mortgagor before his death paid about three-fourths of the mortgage money, and his widow, acting for his estate, paid the rest. The certificate of discharge, given four years after his death, under 29 Vic. ch. 24, O., and duly registered, stated that *the mortgagor* had satisfied the mortgage, and that it was therefore discharged: *Held*, sufficient. *Semble*, that it would have been sufficient, also, if the payer's name had been altogether omitted.

EJECTMENT for part of lot number five, on the south side of Richmond street, in the city of Toronto, containing 3,860 square feet, more or less.

The plaintiffs claimed as the heirs of Andrew Wilson Carrick, who claimed the same by deed from John Smith, and also by length of possession by them and by those under whom they claim.

The defendant, besides denying the plaintiffs' title, asserted title in himself under a lease bearing date the 9th of November, 1863, made by Margaret Ann Carrick to one Stephen Charlton, and by him, with the consent of the said Margaret Ann Carrick, assigned to the defendant.

The defendant, also, under the Administration of Justice Act, 1873, pleaded a defence on equitable grounds.

The plaintiffs replied and demurred to the equitable plea, and issue was joined thereon. The demurrer was before the Court in a former term (see 34 U. C. R. 389,) but the Court declined to determine it until the matters of fact were tried, as it appeared doubtful whether the plea could be supported in fact.

The cause was tried before Hagarty, C. J., C. P., at the last Spring Assizes at Toronto, who found a verdict for the plaintiffs.

The evidence shewed that Andrew Wilson Carrick made a mortgage in fee of the premises on the 29th of March, 1856, to one John Smith, for £1,000, with interest, payable in five equal annual payments, and that Andrew Wilson Carrick died in 1862, having paid off in his lifetime the debt and interest, excepting about \$984.15, which sum his widow,

after his death, acknowledged to be due, and agreed to pay, with interest at the rate of eight per cent.

And the evidence further shewed that the widow and children paid off by payments from time to time that balance, and the interest upon it, when the mortgage was given up to them, and the mortgagee, on the 31st of July, 1866, executed a discharge of mortgage under the statute, which stated "that Andrew Wilson Carrick," (who had been dead then about four years), "of the city of Toronto, baker, has satisfied a certain mortgage made by him to me, which mortgage bears date * * , and was registered * * , and numbered * * , and that I am the person entitled to receive the money, and that the said mortgage is therefore discharged."

That document was registered in the registry office on the day of its execution.

The lease which the widow made in 1863 to Charlton, and under which the defendant claimed, was for sixteen years. It contained a covenant not to assign or sublet without leave. Charlton assigned to the defendant on the 23rd of October, 1867.

The widow said she refused to agree to the assignment unless the defendant would give up the place when her eldest son came of age, because she had been told she had done wrong in leasing the place as she had done, and that the defendant agreed to that, and upon that he entered; and that the defendant refused to give up possession when her eldest son came of age.

The defendant denied he had agreed to give up possession when the eldest son came of age; and he shewed that Charlton had improved the property a good deal, and that he bought Charlton out, and that he himself also laid out about \$200 on the property.

The learned Chief Justice, who tried the cause, found every question of fact against the defendant.

The defendant's counsel contended at the trial that the legal estate was outstanding at the death of Andrew Wilson Carrick, and that the legal estate was not vested in the plaintiffs.

In Easter Term last, *C. S. Patterson*, Q. C., obtained a rule *nisi*, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, or why a verdict or nonsuit should not be entered for the defendant, under the Law Reform Act, on the ground, that the plaintiffs did not shew title in themselves, but the legal title was shewn to be in the mortgagee of the plaintiffs' ancestor.

In this term, *McMichael*, Q. C., shewed cause. The only ground relied upon for disturbing the verdict is, that the discharge of mortgage, given by the mortgagee a few years after the mortgagor's death, states that the mortgagor paid the debt, while he only paid a part of the debt, and his widow paid the remainder of it after his death. It is of no consequence who is said to have paid it. The important facts are the declaration by the mortgagee that the debt is paid, and that the mortgage is therefore discharged. And these facts are plainly stated. He referred to *Sidey v. Hardcastle*, 11 U. C. R. 162, to shew that this defendant should not be allowed to defeat the plaintiffs' title by such an objection; and the Administration of Justice Act of 1873, sec. 49, providing that no proceeding, either at law or in equity shall be defeated by any formal objection.

Beaty, Q. C., supported the rule. The question is, what is the effect of the discharge put in? If it is invalid the mortgage is still subsisting, and it is clear that any one may set up an outstanding mortgage against the plaintiff in ejectment: *Cole on Eject.* 298; *Phillips v. Long*, 9 C. P. 341. The mortgagor did not pay the mortgage money. The discharge which states that he did so is inoperative. The defendant is rightfully in possession. He is the assignee of Charlton, and he has paid rent for several years past to these plaintiffs or their mother who has acted for them.

WILSON, J., delivered the judgment of the Court.

The only question we have to consider is, whether the certificate of discharge of mortgage is inoperative and void

because it states that the mortgagor had satisfied the mortgage when he did not satisfy it fully, but only part of it, his widow after his death having satisfied the remainder of the debt.

To have made it strictly accurate it should have stated that Andrew Wilson Carrick in his lifetime had paid the mortgage debt and interest excepting about the sum of \$984.15, and that since his death his widow had for and on behalf of her late husband's estate paid the remainder of the debt and interest.

The mortgagor did in fact pay in his lifetime more than three-fourths of the principal debt and all the interest, while the mere balance with the interest on a fourth of the original debt only was paid by his estate.

It would not have been correct, therefore, to have stated that the widow of the mortgagor, or the mortgagor's estate, had paid and satisfied the mortgage.

The statement is literally true as to considerably more than three-fourths of all the moneys paid, but it is not accurate that the mortgagor paid the residue; it was his estate which paid it—or, in other words, his executrix. She was, as I understand, acting for the estate when there was no will and no administration granted.

It would be exceedingly hard to persuade us that the certificate because of that error of fact was wholly void, and that the legal title was, as a consequence, still outstanding in the mortgagee, although he had declared that the mortgage was, by reason of his having got the whole of his money *therefore discharged*, and that certificate has been duly registered according to the statute.

The certificate is right upon its face. The mortgagee would not be allowed to dispute it, nor to harass the heirs of the mortgagor with an action of ejectment on the pretext that the legal estate was still vested in him, nor could any person who searched the title discover any flaw in the title by this mis-statement.

There can be no objection to the certificate stating, if the fact be so, that the mortgagor, who is since dead, had in his

lifetime paid and satisfied all money due on the mortgage, because naming the person who paid the debt is not making and does not make that person the assignee or releasee of the estate. When the executor pays the debt due on a mortgage in fee, and that fact is so stated in the certificate, it does not make him the assignee or releasee of the mortgagee's estate, nor does it vest the mortgagor's interest in the land nor the land mortgaged in the executor.

The certificate will vest the estate in the person who has subject to the mortgage the right to the land.

The certificate of discharge was first authorized by the form given in the schedule to the Registry Act of 35 Geo. III., ch. 5. There was no enactment in that statute which authorized it, and under it and the later act of 4 Wm. IV. ch. 16, the certificate could have been given, not only by the mortgagee, but by his heirs, executors, administrators, or assigns. Now a mortgage in fee discharged by the mortgagee's executor, who is the person entitled to the money, does not, by virtue of any title which he has to the land, operate to transfer the legal estate. So far as his right is concerned, it is a mere discharge, but by virtue of the statute it operates as a release or re-conveyance of the original estate of the mortgagor, not to him, but whoever may be entitled to it. The executor in such a case is the donee by statute of a power, and it is a power which he executes when he gives the discharge. The registration of the certificate gives it its full legal effect.

The discharge in this case was given under the 29 Vic. ch. 24, sec. 58. And by that section the certificate is to be in the form I. in the appendix, or to the like effect. That form contains a blank for the name of the person who has paid the money. But the certificate when registered does not operate as a release and conveyance to the person named in the certificate who pays the money, but "to the mortgagor, his heirs, executors, administrators, or assigns of the original estate of the mortgagor": sec. 58.

The certificate too is not required to be in the form given in the schedule. If it is "to the like effect" it will be sufficient.

Now, what difference can it make who paid the money if it were paid and accepted in discharge of the mortgage? And more particularly so when the person, in very many cases, who pays as an executor in the case of a mortgage in fee, is not the person who is to get the land, or in whose favour the conveyance of the original estate of the mortgagor does not operate.

On a joint and several promissory note made by A., B., and C., A. may plead he paid the debt, although in fact it was paid by C.: *Beaumont v. Greathead*, 2 C. B. 494.

So where A. and B. gave a joint and several promissory note to C., who afterwards took from A. the note of D. in satisfaction, which latter note E. ultimately paid: Held, in an action against A. and B. on the first note, that B. could plead payment by himself: *Thorne v. Smith*, 10 C. B. 659

I am not certain whether a certificate omitting the payer's name altogether would not be sufficient. I see no reason why it should not be so. And I think it would be harsh and unwarrantable to hold that putting in the mortgagor's name as the person who paid when it was his executor who did so, or putting in the mortgagor's name alone when the executor's name should have been stated as well, was to vacate the whole discharge, and to enable a squatter perhaps to defeat the heir-at-law of the mortgagor, although the mortgagee himself might not be able to do so.

We hold the certificate to be true in fact as to a very large portion of the debt, and to be sufficient in law on the declaration of the mortgagee that the mortgage because of the payments he has received "is therefore discharged;" and that it has been duly discharged.

The rule will be discharged.

Rule discharged.

BROWN V. O'DWYER.

Estate—Rule in Shelley's case—Conveyance under the Act respecting short forms—Construction of covenants—Covenant for right to convey—Damages—Equitable defence.

Under a conveyance of land to M., to hold "during her natural life, then to go to her heirs equally alike, and their heirs and assigns forever":

Held, that the rule in Shelley's case applied, and that M. took a fee.

A covenant in a deed, purporting to be made in pursuance of the Act respecting short forms of conveyances, that the grantor "hath the right to convey the said land to the said party of the second part," omitting the words "notwithstanding any act of the covenantor," contained in column one of schedule 2 of the Act: *Held*, not a covenant within the statute; but to mean that the covenantor had the right to convey as he had conveyed, *i.e.*, in fee simple.

Held, also, that the omission of these words did not affect the succeeding covenants for quiet possession and further assurance, and that defendant had done no act to encumber, by making them absolute covenants; these covenants being in accordance with the form in column one.

The evidence shewed that when the grantor conveyed there was a mortgage on the land by a prior owner, unpaid; but the grantee, the plaintiff, had taken possession and left after a month, not having been evicted, and no one else had been in possession since; and it did not appear that he had been unable to sell, nor that defendant, the covenantor, had been guilty of any fraud. *Semble*, that only nominal damages could be recovered, the covenant being in effect the same as a covenant for seisin, and a continuing one.

Held, also, that the equitable defence, set out below, was not made out, there not being enough shewn to obtain an unconditional injunction.

ACTION on a covenant for title in a deed of bargain and sale, by which defendant granted certain lands in Caradoc to the plaintiff in consideration of \$700. Breach, that defendant had not the right to convey, and the plaintiff lost the sale of the lands, and the lands were of much less value to the plaintiff, to wit, worth \$700 less than they would have been, &c.

Pleas, 1. *Non est factum*. 2. A denial of the breach of the covenant; and, 3. A special plea on equitable grounds, setting up that the plaintiff when he purchased the lands in the declaration mentioned gave the defendant in part payment a promissory note for \$100 signed by plaintiff payable to defendant; that subsequent to the purchase and before this action, the plaintiff for some cause becoming dissatisfied with the title to the said lands, or pretending to be so, requested the defendant and

urged him to take back the said land at and for a price less by \$100 or thereabouts, than he, the plaintiff, gave for it, in full satisfaction and settlement of all disputes between them in or about the said land, and the title thereof, and all causes of action arising therefrom, all of which defendant then agreed to; and by the mutual desire and request of both said parties conveyances of the said land from plaintiff to defendant were prepared for such purpose, and the plaintiff then requested and urged the defendant to give up to him the aforesaid note of \$100 in part payment and performance of this agreement or settlement, and that he, the plaintiff, would then take the deeds so prepared for re-conveyance and get them executed by his, the plaintiff's wife, and would at the same time execute them himself, whereupon the defendant then handed the said note of \$100 to the plaintiff, who took the same and then and there tore his signature off the said note, and he, the plaintiff, then took the said deeds so prepared for re-conveyance of the land to defendant, saying he would execute the same, and get his wife to execute the same, and the said deeds were so executed by the plaintiff and his wife; and it is inequitable that the plaintiff should be allowed to maintain this action.

Issue.

The cause was tried at the last Spring Assizes in London, before Wilson, J.

The defendant derived title to the land which he conveyed to the plaintiff through a conveyance from Abraham Cook, of the first part, to Mary Mills, of the second part, dated the 29th January, 1841, whereby the party of the first part, in consideration of £50 received from the party of the second part, gave, granted, bargained, sold, aliened, released, conveyed, and confirmed to the party of the second part, the north westerly half of lots six and seven in the fifth concession or sixth range north westerly of the long woods road in the township of Caradoc (describing the land by metes and bounds) together with all houses * * and all and singular the hereditaments and appurtenances to the said

premises in anywise belonging, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate right, title, and interest, claims, property, and demand whatsoever, either at law or in equity, which the party of the first part then had of into or out of the same, and every part thereof, and no more, to hold and to have the same with the appurtenances to the sole and proper use, benefit and behoof of the said party of the second part, to have and to hold during her natural life, then to go to her heirs equally alike, and their heirs and assigns forever, under the reservation as expressed in the original grant from the Crown.

The plaintiff contended that this deed only vested a life estate in Mary Mills, and that she and any one claiming under her could not convey an estate in fee.

It was admitted that at the time defendant conveyed the part of the lot in question to the plaintiff, and at the time of the trial, there was a mortgage from Peter Field and Mary Field (formerly Mills) through whom defendant claimed title, amounting to \$250, with interest at nine per cent. from 20th of April, 1872, on which mortgage nothing was in arrear for principal or interest, and that Mary Field conveyed all her estate in the land to defendant by deed in fee dated 19th June, 1871. This was after her husband's death.

The deed referred to in the declaration was also produced at the trial. It was dated 9th of April, 1872, made in duplicate, in pursuance of an Act respecting short forms of conveyances, between the defendant of the first part, the plaintiff of the second part, and the defendant's wife of the third part, and witnessed that in consideration of \$700 then paid by the party of the second part to the party of the first part, the receipt of which was acknowledged, the party of the first part granted unto the party of the second part, the west half of the north half of lot number six in the fifth concession of the township of Caradoc, to hold to the party of the second part, his heirs and assigns forever, subject to the conditions expressed in the original grant from the Crown.

The covenants were : "The party of the first part covenants with the said party of the second part that he hath the right to convey the said land to the said party of the second part.

"And that the said party of the second part shall have quiet possession of the said land free from all incumbrances.

"And that the said party of the second part will execute such further assurances of the said land as may be requisite.

"And that the party of the first part hath done no act to incumber the land.

"And that the party of the first part hath released to the party of the second part all claims on the said land."

The party of the third part released her dower.

The execution was admitted.

From the verbal evidence given at the trial it appeared that the plaintiff bargained for the place in December, 1871. He obtained the deed in April and went into possession towards the last of April. He remained in possession about a month.

The plaintiff no doubt believed the title was good so that he would hold in fee. He gave defendant \$600 in cash, and his note for \$100 at six months from the 1st of May, 1872, with seven per cent. interest, for the lot. He put in no crops, and when he heard the title was not good he left possession of the land, and no one had been in possession since. He satisfied himself on enquiry that the title was defective, and he offered the plaintiff to lose \$100 if he would take back the land. It was agreed between them that defendant should pay him \$500 and give up the note for \$100 which defendant held against him, and plaintiff should re-convey the land to defendant. Deeds in duplicate were drawn for that purpose and given to the plaintiff that his wife might execute them.

The plaintiff asked defendant after the agreement to repurchase if he had any objection to give him back the old note, he said no, and handed it to him, and he tore his name off it, and defendant said he reached his hand and took back the note with the name torn off; plaintiff said he laid

it on the counter after he tore off the name. Defendant produced the note at the trial.

After the plaintiff took the deeds to be executed he saw defendant. The plaintiff's account of the matter of the re-sale was, that he had been several times to make a settlement with defendant, who at one time offered him village lots in settlement, and they agreed if he paid him \$500 and gave him his note back he, plaintiff, would settle. Plaintiff said "I was to get cash from defendant: he wanted to give me some money and short notes or paper; I said turn your short paper in the bank and give me money and I will take \$100 less than I gave you." The plaintiff in his evidence also said he told defendant in Strathroy he was ready to sign the deed if he, defendant, was ready to give him the money. Defendant replied he, plaintiff, was bound to give himself trouble, *so go ahead*.

The defendant in his evidence said the agreement was that he was to pay so much down, but no sum was mentioned, and to give plaintiff bankable paper for the balance, and when plaintiff came next day to Strathroy and said the deeds had not been executed he was angry; he gave him some short answer, and walked away.

On cross-examination he said there was no agreement as to how much of the \$500 was to be cash; bankable paper was mentioned, but not how many notes, or at what date, or who was to endorse, or if to be renewed or not. He thought any paper not exceeding ninety days bankable paper.

A witness in reply was called, who said he went to Strathroy with the plaintiff and was present at the interview with defendant: that the plaintiff offered to sign the deeds if he got the money; the defendant said "You are bound to give yourself trouble, *so go ahead*."

The defendant's counsel at the trial contended the defendant was entitled to a verdict on the plea of *non est factum*: that the deed purported to be made under the statute, but the words "notwithstanding any act of the covenantor," given in the margin of the statute, were omitted in the deed; the

covenants were of a qualified nature, while the declaration set it out as absolute ; and that if the declaration was amended so as to set out a qualified covenant, the plaintiff could not then recover.

2. That the deed from Cook to Mills passed the fee, so no breach as to that ever occurred : that the mortgage was not made by the defendant, and was not a breach of the covenant sued on, whether qualified or absolute.

3. That the facts proved under the plea entitled defendant to a verdict, as it entitled him to absolute and peremptory relief in equity.

As to damages, that under the evidence the plaintiff was only entitled to nominal damages.

That if the covenant was absolute it was a continuing covenant, and damages might be recovered from time to time, as each cause of action accrued, and no eviction or disturbance of possession was alleged or proved.

It was consented that a verdict should be entered for defendant, with leave to the plaintiff to move in any form or for any purpose he pleased, and for such damages as he might think he was entitled to. A verdict was accordingly entered for the defendant.

In Easter Term *Becher*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff on all the issues, with such damages as upon the law and evidence the Court should consider the plaintiff entitled to ; or that the Court should pronounce the verdict upon the law and evidence which in their judgment the learned Judge who tried the cause ought to have pronounced ; and to amend the *postea* and enter such verdict accordingly, on the ground that the verdict entered is against law and evidence, and that the plaintiff is entitled to recover.

During the term *Bayley* shewed cause. The covenant is a limited covenant : Consol. Stat. U. C. ch. 91, sec. 2 ; *Leith's* Real Property Statutes, 102, 103. The question is, what is the effect of the deed from Cook to Mills, the words "heirs and assigns" not being in the grant-

ing part, and the *habendum* being to hold during her natural life then to go to her *heirs* equally alike, and to their heirs and assigns forever Under the rule in *Shelley's* case Mary Mills took an estate tail: *Bradley v. Cartwright*, L. R. 2 C. P. 511. Here the words heirs may apply as words of limitation. The word issue is different. The heirs are distinctly pointed out and they take a fee tail. There is nothing to shew that the term heirs was not used according to its usual meaning. The word "issue" in *Bradley's* case meant children. The mortgage referred to is no breach of defendant's covenant. A covenant that a grantor has good right to convey is not more extensive than the covenant for seizin, and that has not been broken here, as there are no arrears due on the mortgage, and the possession has not been interfered with: *Rawle* on Covenants, 4th ed., 53 *et seq.*, 114. The covenant is not broken by the existence of the mortgage. It would be a breach of the covenant against incumbrances, and if so there would only be nominal damages as the breach would be a continuing one; *Kingdon v. Nottle*, 1 M. & Sel. 355; *Kennedy v. Solomon*, 14 U. C. R. 623; *Graham v. Baker*, 10 C. P. 426; *Mayne* on Damages, 97. *Hackett v. Boulton*, 3 C. P. 407 is distinguishable. Interest should not be allowed: *Rawle* on Covenants, 93. If the Court should be against the defendant on all the grounds, the verdict should be for plaintiff for \$600, the notes should be returned to him, and he should convey the land back to the defendant. The consideration mentioned in the equitable plea was partly paid to the plaintiff, by delivering the note.

Becher, Q. C. The effect of his covenant is, that he has a right to convey in fee simple, as the deed shews he intended to convey: *Wallbridge v. Everitt*, 22 C. P. 28; *Austin v. Ferguson*, 25 U. C. R. 270. See also *Bradshaw's case*, 9 Co. 60, *b*, as to the breach being as broad as the evidence, and *Wotton v. Hele*, 3 Saund. 181 *b*. The plaintiff had not a right to convey in fee simple. Plaintiff can recover as to the mortgage, though there was no money paid or no eviction: *Hackett v. Boulton*, 3 C. P. 407;

Mayne on Damages, 2nd ed., 149. If Mary Mills's title is considered good the plaintiff should be allowed to amend by adding a count on the covenant against incumbrances. This case and the rule in *Shelley's* case are different, as nothing is said in the granting part about heirs. If "to heirs equally" implies distribution, then there are words which would carry an estate in fee: *Jarman* on Wills, 3d ed., 437; *Montgomery v. Montgomery*, 3 Jo. & Lat. 47. If there was only a life estate in Mary Mills, the plaintiff is willing to convey and get his purchase money and interest. As to damages: *Graham v. Baker*, 10 C. P. 426; *Snider v. Snider*, 13 C. P. 157; *Bannon v. Frank*, 14 C. P. 295; *Hackett v. Boulton*, 3 C. P. 407; *Carlisle v. Orde*, 7 C. P. 456. The equitable plea is not proved. The important allegation is not proved as to the execution of the deeds from plaintiff to defendant. The following cases were also referred to: *Browning v. Wright*, 2 B. & P. 13; *Nind v. Marshall*, 1 Bro. & Bing. 319; *Foord v. Wilson*, 8 Taunt. 543; *Stannard v. Forbes*, 6 A. & E. 572; *Gratz v. Ewalt*, 2 Binney 98.

RICHARDS C. J., delivered the judgment of the Court.

The Rule in *Shelley's* case, is thus stated in the note to the case reported in 1 Rep. 106 *b*: "The rule established by the decision in this case, which has since obtained the denomination of 'The Rule in *Shelley's* case,' is generally considered to have originated in feudal policy, when the law favoured descents, in order that the lord might have the fruits of his seignory: see Collect Jur. 298, 305, 312; *Fearne* Cont. Rem. 4th ed. 96; 1 *Prest. Est.* 2nd ed. 295; 1 Inst. ii. 143-4 (P). It has been variously defined by different writers—see 1 *Prest. Est.* 263, 265—and may be thus stated, 'That where in any instrument an estate for life is given to the ancestor, and afterwards by the same instrument the inheritance is limited either mediately or immediately to his heirs, or heirs of his body, as a class to take in succession, as heirs to him, the word 'heirs,' is a word of limitation, and not of purchase, and the ancestor takes the whole estate.' There are a number of cases cited as affirming this view.

The word heirs, when used has peculiar signification. If the word heir, had alone been used it might have been different. But if the subsequent words describe "an order of succession different from that which must take place under the limitation to the heirs as originally named, and will not admit of the construction that by the heirs secondly named are meant the heirs in succession, of the heirs first named as the heirs of the ancestor, the words 'heirs' in the first branch of the limitation, will be words of purchase." 1 Rep. 1066, note; 1 *Prest. on Est.* 349, is cited as authority for this.

A case illustrating this view was referred to in the argument of *Shelley's* case, where there was a gift to a man for life, remainder to his heirs, and the heirs female of their bodies; or where there is a devise to A. for life, remainder to his next heir male, and the heirs male of the body of such next heir male. Several cases are cited to establish the same proposition.

Now the words of the deed conveying this land to Mary Mills, the party of the second part, are, "to have and to hold the same with the appurtenances, to the sole and proper use benefit and behoof of the said party of the second part, to have and to hold during her natural life, then to go to her heirs equally alike and their heirs and assigns for ever."

Here heirs "must, in case of Mary Mills's death, be the heirs of the ancestor, and they are the heirs in succession of the heirs first named; and so the case is brought expressly within the Rule in *Shelley's* case," and Mary Mills consequently took a fee.

The last case I have seen on the Rule in *Shelley's* case, is *Brookman v. Smith*, L. R. 6 Ex. 291.

The deed from defendant to the plaintiff purports to be made pursuant to Consol. Stat. U. C. ch. 91; entitled "An Act respecting short forms of conveyances."

Sec. 1 provides that "When a deed made according to the forms set forth in the first schedule to this Act * * contains any of the forms or (in the Imperial Statute, of)

words in column one of the second schedule annexed hereto and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed *as if it contained* the form of words contained in column two of the same schedule, and distinguished by the same number as is annexed to the form of words *used in the deed*, but it shall not be necessary in such deed to insert any such number."

In the Consolidated Statutes of Upper Canada, ch. 91, and in the Act as originally passed by the Legislature of Upper Canada, the word *or* is used, instead of *of*, as in the Imperial Statute as above noted, and in the concluding part of the section in the Consolidated Statute, as well as the Imperial Act; the words "*as if it contained*," in italic letters, are not inserted, but in their place the words used are "*as if such party had inserted in such deed*;" and again, the words "*used in the deed*," are not in the two prior statutes but the words are, "*employed by such party*."

Sec. 2 provides that "Any deed, or part of a deed, which fails to take effect by virtue of this Act, shall, nevertheless, be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made."

Sec. 3 provides that every such deed, unless an exception be specially made therein, shall include all houses, &c., and all the estate of the grantor &c., and the reversion," &c.

Under the head of the second schedule and directions as to the form in the schedule, it was provided:—

1st. That parties might substitute names for the words "*covenantor, covenantee*," &c.

3rd. "Such parties may introduce into, or annex to, any of the forms in the first column, any express exceptions from, or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column."

4th. Words may be added to form 2 of the first column, "so as thereby to extend the words thereof to the acts of any

additional person or persons or classes of persons, or of all persons whomsoever ; and in every such case the covenants two, three, and four, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons so named.

I do not think the difference noted between the Consolidated Statute and the Imperial Statute, would make any difference in the construction of the two acts. I think the word *or* instead of *of*, being the first variance referred to, is a misprint. The obvious intention is to make the forms of words in the first column of the schedule have the meaning affixed to them in the second ; and the statute contemplates the use of any of the forms of words in the schedule, and also contemplates exceptions to or variations of them.

The words as to the first covenant are, "that he, the party of the first part, hath the right to convey the said land to the said party of the second part." The words "notwithstanding any act of the said party of the first part," are omitted.

This covenant, I suppose, without regard to the statute, would be a legal and binding covenant ; and if it fail to take effect by virtue of the Act, may bind the parties thereto.

It does not contain the "form of words" in the first column of the schedule, and therefore I do not think it can be construed as if it contained the "form of words" contained in column two of the same schedule. The very intent of the Act seems to me to permit a certain short form of words to be used in one column, which shall be held to mean all the words contained in the second column.

The statute contemplates the adding of names and classes of persons, so as to extend the words thereof to the acts of any additional persons or class of persons, or of all persons whomsoever.

If the mortgage complained of had been given by the defendant, and he had intended to relieve himself from the effect of the covenant under the statute, all that would have been necessary would have been to have introduced

it by way of exception to the form in the first column of the schedule, and that would extend to the second. It may be that if, after the words in the covenant contained in this deed, the words, "notwithstanding any act of the party of the first part, or of all and every other person or persons whomsoever" had been added, then it might be urged that the additional words would apply and be used in column two as applicable to that covenant and to covenants three and four.

Merely omitting the words, "notwithstanding any act of the said," from the covenant in the deed, cannot, in our judgment, make the covenant operative, in a limited form so as to affect numbers three and four; nor do we think it can operate so as to affect number two. It must be considered as failing to take effect under the statute, but nevertheless it binds the defendant according to its very words.

The deed, in effect, purports to grant the land to the plaintiff in fee simple; and his covenant is, that he hath a right to convey the said land to the plaintiff. The legal effect of the covenant is, that he has the right to convey as he has conveyed, in fee simple.

The evidence shews he has not this right, for there was a mortgage on the land by a prior owner, which, when this deed was given, was unpaid, and the legal title was not in the defendant, and this covenant, therefore, was broken as soon as made.

The evidence, however, shews that the plaintiff entered into possession of the land, and remained in possession over a month, and then left it, not having been evicted by title paramount, and no one else having been in possession up to the time of the trial.

The legal effect of the covenant is set out in the declaration; and in the view we take of the effect of the deed, it was broken by the outstanding mortgage. As already intimated, we do not think the covenants for quiet possession and freedom from incumbrances go beyond the acts of the defendant himself, as shewn by column two of the schedule in relation to those covenants.

The defence set up fails, we think, as an equitable defence at law. A court of equity would require something more to be done than was done before an unconditional injunction would have been granted.

This covenant is a continuing covenant according to *Kingdon v. Nottle*, 1 M. & S. l. 355, and may be sued on at any time when there is a breach; and damages may be given to compensate the party for the injury he has sustained. The plaintiff does not shew an eviction, nor as a matter of fact that he was not able to sell the estate for as much as he otherwise would but for the incumbrance on it. He was in possession, and may go into possession again, and may never be interfered with on account of this mortgage. Suppose he recovers the full amount of it from the defendant, and is never called on to pay the mortgage, what is to be done with the money so paid; and if the mortgage is paid, will the plaintiff have his remedy on the covenants against the mortgagor?

Graham v. Baker, 10 C. P. 426, and *Snider v. Snider*, 18 13 U. C. R., 157, decide that under a breach of the covenant for seizin, on the plaintiff merely shewing that the defendant was not seized, only nominal damages can be recovered.

The covenant sued on in *Lethbridge v. Mytton*, 2 B. & Ad. 772, was a covenant to pay off a mortgage within twelve months; and the Court held, as it was an express covenant to free the estate from incumbrances within a year, the only way in which that could be done at law was to recover the whole amount of the incumbrances. It was, nevertheless, suggested that defendant might obtain relief in equity.

Here the covenant is, in effect, the same as a covenant of seizin; and until the party is disturbed in the possession, or some injury can be shewn beyond the mere breach of the covenant, it would seem not more than nominal damages can be given.

If the plaintiff, as already intimated, had been prevented from going into possession, or had been evicted, then of course his damages would be more than nominal. If he

had paid off the mortgage, perhaps he could have claimed the amount of money so paid as damages.

If it appeared he had offered to sell the place, and had not been able to sell for so much as he otherwise would, that might be the measure of the damages.

If the defendant had been guilty of any fraud, of course that would make a difference.

At present I see great difficulties in giving leave to the plaintiff to enter a verdict for substantial damages. If he had delayed until his rights were interfered with, then he might recover substantial damages; and perhaps it will be better for him to consider if he will have a nonsuit entered or a new trial, as suggested in *Graham v. Baker*, 10 C. P. 426.

Rule absolute for a new trial, on payment of costs (a).

ROUNDS v. MAY.

Promise to pay the debt of another—Consideration—Statute of Frauds.

A. being indebted to the plaintiff in \$1,100 for timber furnished to him, and used in a vessel which he had contracted to build for the defendant, the plaintiff refused to furnish any more, and the defendant then said to him, that if he, the plaintiff, would furnish what further timber was required to finish the vessel, he, defendant, would pay the plaintiff for it, on the plaintiff getting an order from A.; and that if the plaintiff got an order from A. for the debt then owing by the plaintiff to A., he would pay it. *Held*, that the promise as to the \$1,100 was void, under the Statute of Frauds, not being in writing; and that it must be regarded as a mere naked undertaking to pay A.'s debt, not as made in consideration of the plaintiff furnishing A. with the timber.

Declaration. First Count: that persons of the name of Andrews were building certain vessels, of which vessels the defendant was the owner, and that the plaintiff had furnished a quantity of timber to the Andrews for building the vessels, and had refused to furnish any more: that in consideration that the plaintiff, at the request of defen-

(a) The plaintiff's counsel having intimated that he wished a new trial, the rule was drawn up as above stated.

dant, would furnish certain timber required to finish and complete the vessels, the defendant promised to pay the plaintiff for all such timber as he had furnished, or might thereafter furnish, for the construction of such vessels : Averment : that the plaintiff furnished and delivered to the Andrews a quantity of timber, &c., and defendant had not paid, &c.

Second count. Somewhat similar to the first, but laying the promise by defendant to pay for such timber out of such moneys as should become due to the Andrews for and in respect of the said vessels, if they would give an order to the plaintiff upon the defendant for that purpose ; Averment : of the furnishing of timber ; the Andrews giving an order to the defendant to pay the plaintiff for the timber furnished for the vessels, and defendant's refusal to pay for such timber or the amount of the order, &c.

Common money counts were added.

Defendant pleaded several pleas, traversing all the material allegations in both first and second counts ; and

Sixth plea : that at the time of notice of the order he had no money in his hands to be paid to the Andrews.

These were also pleas of payment, and never indebted.

The cause was tried before Hagarty, C. J., C. P., at the Spring Assizes for Welland.

At the trial the plaintiff stated that the Andrews were building boats for defendant : that he had supplied them with timber : that they had paid him about half the amount : that he refused to furnish them with more : that defendant came to him and asked if he could cut some timber for his boats : that he said 'No,' that he had already \$1,100 in the boats : that defendant said if he, plaintiff, would cut enough to finish his boats, and get an order from Andrews, he would pay it—for what plaintiff would cut for defendant, and for what Andrews owed the plaintiff, if he, plaintiff, got an order ; and that the plaintiff agreed : that this was in the spring of the year : that he, the plaintiff cut the timber for him and delivered it to Andrews for the boats ; that the plaintiff made out his bill for what he so cut for

defendant and gave it to him ; that defendant said : “ Have you got your order ? ” The plaintiff said : “ No ; but that Andrews was there and could write it. ” He did so, and plaintiff gave the order to defendant ; that defendant asked if he, plaintiff, was hard up for the money just then ; he said not for a few days, and defendant said if plaintiff would wait a few days, till he came up again, it would suit him. Plaintiff agreed. He gave him a check for \$300 odd for the stuff cut for him ; that they went down to one of the boats and saw Scoles, defendant’s foreman. Defendant told him he had taken an order from Andrews, and that if there was money coming to Andrews when the boats were finished he would pay plaintiff : that he, plaintiff, said he was surprised, and said he did not expect that : that defendant said, he need not mind, he, plaintiff, would be all right, there would be \$4,000 or \$5,000 going to Andrews when the boats were finished. (The order was produced at the trial, but did not appear among the exhibits. It was written first of June, but dated back 28th May, as Andrews said that, having given an order for the timber furnished, he did not want two orders dated same day.)

In cross-examination the plaintiff stated, that, when he made the bargain with defendant, it was early in April, and that he had then charged Andrews in his books with the \$1,100 : that the bill he rendered defendant was over \$500 ; that he had paid \$200 before, and the check he gave him was for over \$300.

W. H. Andrews was called. He stated that he owed the plaintiff \$1,100 for stuff he got, and that he would give him no more until he was paid ; that afterwards the plaintiff furnished more stuff for the boats : that on the 1st June plaintiff and defendant met : and plaintiff produced his account of what he had furnished on defendant’s order, when witness gave an order for \$576, and also gave plaintiff an order on defendant for \$1,100 : that the plaintiff presented this order to defendant, who said he had been paying out much money for us, and he would like plaintiff to wait until he came up again ; plaintiff agreed, saying he was not hard

up : that the vessels were not finished until July : that he, witness, had no settlement with defendant, but that he, defendant, gave him, perhaps, \$3,600 after that ; and he said he credited defendant with the \$1,100 order ; the \$3,600 was paid through them ; they furnished statements to Scoles, and he got the money for wages. He said that defendant did not ask witness to make out the \$1,100 order, but he saw plaintiff present both orders to the defendant.

James H. Dixon stated that defendant told him in May, 1872, that he had to make a special agreement with the plaintiff to get oak, and that before he would agree to give it, he had to promise to pay plaintiff \$1,100 that Andrews owed for stuff delivered before. On cross-examination, he said that defendant did not say that it was conditional on his owing Andrews when the work was done.

Samuel Gilchrist stated that defendant told him he had to advance \$1,100 of an order for plaintiff ; that he had accepted an order for \$1,100.

The plaintiff's case being closed, the defendant's counsel objected that the plaintiff could not recover, and the learned Chief Justice reserved leave to the defendant to move to enter a nonsuit.

For the defence the defendant was called, and stated that he asked the plaintiff to cut timber ; he said he would cut no more for Andrews, but would cut for him, defendant, what he wanted ; that he called Scoles, his foreman, and stated that anything Scoles certified for from that time as going into any vessels he, defendant, would pay for : that the plaintiff cut \$500 worth for him, which he paid : that the plaintiff complained of Andrews owing him : that he, defendant, said that Andrews had overdrawn with him, and that he could not pay him any more : that he had to pay the wages weekly on Scoles's certificate, as the money had to go through Andrews' hands under the contract : and that he told plaintiff that if, when the vessels were finished, any money was going to the Andrews he would pay plaintiff on their order, and if the order was left with him he would pay it, if so much was going to them on settlement ;

that if he had agreed to pay the \$1,100 absolutely, he could have done so, as he had the money in the bank ; the order was left with witness.

Thomas Scoles, foreman of defendant at the plaintiff's mill, was called as a witness, and said, defendant shewed the witness the order for \$1,100, and said he accepted it on condition, that if any money was left for Andrews when the vessels were completed he was to pay the amount to the plaintiff with Andrews's consent. He heard no objections made by the plaintiff ; this was after the oak was delivered to defendant : that he was also present when defendant ordered the oak ; the plaintiff said he would cut it for defendant if he would be responsible ; on that occasion he heard nothing of the \$1,100, or the order for it.

The learned Chief Justice, in leaving the case to the jury, asked them to say whether the defendant unconditionally promised to pay the \$1,100, if the plaintiff would furnish the oak timber, and if so, to find for the plaintiff.

The jury found the promise was unconditional, and gave a verdict for the plaintiff for \$1,155.

In Easter term, 1873, *McCarthy*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit, pursuant to leave, or for a new trial, on the ground that the alleged contract was a contract to answer for the debt of another, and void under the Statute of Frauds ; and because the verdict was contrary to law and evidence, and against the weight of evidence, it appearing that the defendant was not in any way liable for the debt, and that there was no reason for the defendant assuming the liability.

During Hilary term, 1874, *Bethune* shewed cause. The question is, was this a guarantee of a debt of another within the Statute of Frauds, or was it a new promise. We contend that it was a new promise : *Tumblay* v. *Meyers*, 16 U. C. R. 145 ; *Andrews* v. *Smith*, 2 C. M. & R. 627 ; *Dixon* v. *Hatfield*, 2 Bing. 439 ; *Forth* v. *Stanton*, 1 Wms. Saund 220, 234 ; *Leake* on Contracts, 127.

Lee v. Mitchell, 23 U. C. R. 314, is distinguishable, as there was no new consideration in that case.

McCarthy, Q. C., supported his rule. This promise would be void if in writing for want of consideration : *Lee v. Mitchell*, 23 U. C. R. 314 ; *Merner v. Klein*, 17 C. P. 287 ; *Tomlinson v. Gell*, 6 A. & E. 564 ; *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613 ; *Mallet v. Bateman*, L. R. 1 C. P. 163. Next, it must be in writing to be valid : *Matson v. Wharham*, 2 T. R. 80 ; *Hargreaves v. Parsons*, 13 M. & W. 561. The promise is not to the original person : *Castling v. Aubert*, 2 East 35 ; *Reader v. Kingham*, 13 C. B. N. S. 344 ; *Read v. Nash*, 1 Wils. 305 ; *Fish v. Hutchinson*, 2 Wils. 94 ; *Bird v. Gammon*, 3 Bing. N. C. 883 ; *Butcher v. Steuart*, 11 M. & W. 857.

MORRISON, J., delivered the judgment of the Court.

From an examination of the plaintiff's evidence, given at the trial, the facts and circumstances are nearly as follows : The Messrs. Andrews being indebted to the plaintiff in \$1,100 for timber furnished to them and used in a vessel the Andrews had contracted to build for the defendant, the plaintiff refused to furnish the Andrews with any more timber. The defendant spoke to the plaintiff about it, and said to him that if he, plaintiff, would furnish Andrews with whatever further timber was required to finish the vessel, he, defendant, would, on the plaintiff getting an order from Andrews, pay him for it ; and at the same time defendant said that if the plaintiff got an order from Andrews for the amount of the debt then owing to the plaintiff by Andrews, he would pay it. The plaintiff furnished the necessary timber, delivered the bill of it to defendant, and obtained Andrews's order, and the defendant settled the amount as he agreed. As to the debt of \$1,100, the defendant, in the presence of the plaintiff, told his foreman that he had an order from Andrews for it, and that if there was money going to the Andrews when the vessels were finished, he, the foreman, was to pay the plaintiff the amount ; in this the plaintiff did not acquiesce.

It was contended by the defendant that the promise, if any, as to the \$1,100, being a promise to pay the Andrews's debt, was void under the Statute of Frauds.

The plaintiff, on the other hand, contends that the promise as to this past debt was not a collateral one, but an original one, based on the consideration of the plaintiff furnishing the timber to finish the vessels that Andrews was building for the defendant.

There was no liability on the part of the defendant to pay this debt of \$1,100 other than would arise from his promise in question.

In considering the plaintiff's testimony, we must look to the actual character of the transaction, and the intention of the parties.

Now, it seems to us that what took place between the plaintiff and defendant may be divided into two separate and independent branches or transactions; the one a promise on the part of the defendant, that if the plaintiff would furnish Andrews with further timber to finish the vessel, he would, on Andrews's order, pay the plaintiff for such timber; the other engagement a promise on the part of the defendant that he would pay the debt then due by Andrews to the plaintiff, upon his getting an order from Andrews.

This latter promise, by itself, was certainly one to pay the debt of another, and to it the Statute of Frauds is a good defence.

We cannot see, from the evidence or the transaction itself, that there was any original consideration for the undertaking, as a primary liability on the part of the defendant, to pay the \$1,100. It seems to us to be, at the most, a mere gratuitous promise made to the plaintiff, to accommodate him, that if he obtained an order for the debt so due by Andrews to the plaintiff, he, the defendant, would see it was paid.

The fact of an order being necessary shews that the promise was not an original one, but one depending upon the contingency of the order as well as that there would be

money going from the defendant to Andrews, and that he would, in that case, be answerable for the debt.

If the engagement of the plaintiff, as put by him at the trial, had been reduced to writing, it would have been as follows:—"I promise, if the plaintiff will cut and furnish enough timber to enable the Messrs. Andrews to finish the vessels they are now building for me, that I will pay him for the same on producing an order from Andrews. I also engage to pay the plaintiff the debt now due of \$1,100 from Andrews to the plaintiff upon an order of Andrews."

Now the promise here, so far as the furnishing of the timber was concerned, would be good, but would be void for the \$1,100, as held in the case of *Wood v. Benson*, 2 C. & J. 94.

What took place between the parties, as related by the plaintiff, is not by any means distinct or certain. It was however, for the plaintiff to make it so, and not leave it to mere conjecture.

We cannot say from the evidence that it was mutually understood between these parties that the plaintiff furnishing the Andrews with timber to finish the vessels was the consideration for a primary liability on the part of the defendant to pay for such timber, as well as a primary liability to pay unconditionally the then existing debt of \$1,100 due by the Andrews to the plaintiff.

We leave out of view the value of the timber to be so furnished—for if the plaintiff's contention is right, if the timber was only of the value of one shilling, the effect is the same. It is to be borne in mind that it is not pretended that any thing was said or done to extinguish the debt due by the Andrews to the plaintiff; they still remained liable. An order from them, which implied money being in the hands of the defendant of theirs, was necessary to authorize the defendant to pay the plaintiff.

The substance of the transaction, as it appears to me, is this: The defendant said to the plaintiff, "If you will not furnish any more timber to the Andrews, I will pay you myself for any timber that you may hereafter cut for them,

upon your getting an order for the amount; and I will undertake, if you get an order from them, to pay you the debt they now owe you."

Can it be said that the last engagement is anything more than a naked promise by the defendant or undertaking to pay the debt of another?

Wood v. Benson, 2 C. & J. 94, is a case having a bearing on the one before us, on the principal point, as well as to shew that a promise or agreement may be void in part under the Statute of Frauds. There the defendant engaged to pay the directors of the Manchester water works (in writing), or their collector, for all the gas which might be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it was occupied by his brother-in-law, Mr. Neville; "and I do also engage to pay for all arrears which may be now due."

Lord Lyndhurst, C. B., in giving judgment, said, at p. 98, "The contract resolves itself into two parts. One is, 'I engage to pay for all the gas which may be consumed,' &c.; that is a distinct engagement. The other part is, 'and I also engage to pay all arrears,' &c. Now, this latter part cannot be sustained; for if it be a distinct engagement, there is no consideration to support it expressed in the instrument."

The real question here, in our opinion, is, whether the alleged engagement to pay the previous debt of \$1,100 was made in consideration of furnishing the Andrews with timber which the defendant had independently promised to pay for, or whether it was a mere naked undertaking by itself to pay Andrews's debt.

In our opinion, the plaintiff's evidence shews it was the latter, and therefore there was no legal evidence on which the jury could find for the plaintiff.

I have examined the numerous cases referred to in the text-books, and the rulings and decisions upon this section of the statute cannot be said to rest on any clear or defined ground, the difficulty to be solved, in many cases, being whether the promise is collateral or original; if the latter, it is not within the statute, and if the former, they

generally are, though there are cases in which the rule may not apply.

Kent, C. J., in stating the principle in *Leonard v. Vredenburg*, 8 Johns. 29, says, at p. 39: "When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, * * * it is not within the statute."

But, as said in *Brewster v. Silence*, 4 Seld. 207, N. Y. Court of Appeals, p. 211: "The then Chief Justice hoped, by his learned and elaborate opinion in that case, (*Leonard v. Vredenburg*,) to put at rest forever most of the questions arising under that branch of the Statute of Frauds which relates to special promises to answer for the debt, default or miscarriage of another. But a review of the cases in this State for the last forty years, will shew how fruitless was the attempt."

In the notes to *Forth v. Stanton*, 1 Wms. Saund. 211, *b*, we find it said: "The question is, is it a promise to pay the debt of another, for which the other was and still remains liable after the promise is made? If it be, then the statute requires a writing, for it is then a collateral, and not an original promise."

In *Kent's Com.*, vol. iii., 11th ed., 175, the learned author says: "There are no such words in the Statute of Frauds as original and collateral. The promise referred to is to answer for the debt or default of another. The term *debt* implies that the liability of the principal had been precedently incurred; but a *default* may arise upon an executory contract; and a promise to pay for goods to be furnished to another is a collateral promise to pay on the other's default, provided the credit was, in the first instance, given solely to the other. If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral, and must be in writing. If the original debt remains a subsisting debt, a promise by a third person to pay it, in consideration of forbearance, is a collateral promise."

By the alleged undertaking of the defendant to pay Andrews's debt of \$1,100, I see no advantage accruing to the defendant for such a promise. It is true that the timber in question, the defendant expected, would be used by the Andrews to carry out their contract with him. They might or might not have so used it. It was timber to be cut and delivered to the Andrews, to be paid for by the defendant, which was not disputed.

The furnishing the timber, it was not pretended, could be a disadvantage or inconvenience to the plaintiff; he was getting full value for it.

It seems to us that there could not be a stronger case to shew the necessity of the statute in order to prevent perjury by requiring the promise to be in writing than this, where it is attempted to fix a large liability on the defendant for the debt of another by loose conversation, one of the main objects the statute was passed to guard against. We are therefore, of opinion the rule should be made absolute.

Rule absolute.

BROWN V. WRIGHT ET AL.

Insolvent Act—Operation of assignment—Division Court bailiff—Action for delay in selling under execution.

Defendant, a Division Court bailiff, received an execution against K. on the 12th of May, 1873, on a judgment recovered on that day, on which, on the 14th, he seized two horses. On the 10th K. executed a voluntary assignment under the Insolvent Act, but the assignee on being made acquainted with it, advised a private settlement, and did not receive and act on the assignment until the 7th June. The bailiff, who had left the horses in K.'s possession, taking a bond for their forthcoming, took them again and advertised them for sale on the 2nd June, but on being notified by the official assignee he delivered them over to him on the 9th. The plaintiff then sued the bailiff and his sureties on their covenant, for not selling and paying over the money between the seizure and the claim by the assignee.

Held, that he could not recover; for 1. there was no misconduct, because the horses passed to the assignee on the execution of the assignment, which was before the judgment; and 2. if the delivery was a breach of duty, the plaintiff had sustained no damage, from it, for if the bailiff had proceeded to sell sooner the assignee would no doubt have claimed the horses, as he did afterwards.

THIS was a County Court case, tried before Galt, J., at the last Spring Assizes for the county of Carleton, with a jury.

The action was one brought against Wright, a Division Court bailiff, and his two sureties, upon their covenant given under sec. 26 of the Division Courts Act, Consol. Stat. U. C. ch. 19.

The material facts proved at the trial were as follows: The defendant Wright was a Division Court bailiff, and the other defendants were his sureties. On the 12th May, 1873, an execution was placed in the bailiff's hands at the suit of the present plaintiff against two persons of the name of Kedy, for the sum of \$107, which execution was returnable on the 12th June. On the 14th of May the bailiff seized two horses belonging to the execution debtors and took a bond for their being forthcoming.

It appeared that on the 10th May the Kedys executed a voluntary assignment, the execution of which was sworn to on the 12th, in accordance with the Insolvent Act, to the official assignee for the county of Carleton. The official assignee, when made acquainted with the assignment, to

save expense advised the parties to try and make a private settlement. This failed, and he finally received and acted on the assignment on the 7th June.

On the 2nd of June the bailiff, having again taken the horses, advertised them for sale under the execution. A notice was served on him by the official assignee claiming the horses under the assignment, and the bailiff delivered them to the assignee on the 9th of June, the plaintiff being present at such delivery and assenting thereto.

Under these circumstances the plaintiff contended that the bailiff had wilfully misconducted himself, in not advertising and selling the horses, and making and paying over the money, in the interim between the seizure and the day the official assignee claimed the horses.

The plaintiff was nonsuited.

During last term *Patterson*, Q. C., obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiff for \$107.03, or for such other sum as the Court should order, pursuant to leave reserved at the trial.

During this term *Osler* shewed cause. The evidence did not support the plaintiff's case. The Judge found the bailiff had been guilty of no negligence in fact. He referred to *Levi v. Abbott*, 4 Ex. 588; *McIntosh v. Jarvis*, 8 U. C. R. 535.

Beaty, Q. C., contra. The bailiff let three weeks go by in which he might have seized and sold. There were goods sufficient to have made the debt, from which he might have levied. The assignment is not valid till accepted by the assignee. He referred to *Sinclair v. McDougall*, 28 U. C. R. 888, and to *Yarrington v. Lyon*, 12 Grant 308.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that this rule should be discharged.

Two questions present themselves. Was there default and misconduct on the part of the bailiff to entitle the plaintiff to sue the bailiff and his sureties on their covenant; and if there was default or delay in the proceedings by the

bailiff, did the plaintiff thereby sustain any damage; for if he sustained no damage the defendants are entitled to our judgment.

As to the first point, if the horses in question passed under the assignment to the official assignee upon its execution by the execution debtors, there could be no default on the part of the bailiff in returning the execution *nulla bona*, as the voluntary assignment was made before the recovery of the plaintiff's judgment and the issuing of the execution thereunder, the assignment being made on 10th May, and the recovery of the judgment and the delivery of the execution to the bailiff being on the 12th of May, so that on that day the debtors had no property in the horses; and it seems to us that such was the case.

The assignment was one made in pursuance of the Insolvent Act of 1869. By sec. 10 the assignment shall be held to convey and vest in the interim assignee in the first instance all the personal estate of the insolvent; and by the 116th section the operation of section 10 shall extend to all the assets of the insolvent of any kind or description, although they are actually under seizure on any ordinary writ of attachment or under any writ of execution, so long as they are not actually sold by the sheriff.

It was, however, contended that as the official assignee did not act under the assignment until the 9th of June, the assignment was inoperative until then, and that the bailiff might in the interim have sold the horses under the execution and realized the money for the plaintiff, and that his not doing so was misconduct on his part.

I cannot think so, for it appears to me that the assignment being duly executed by the execution debtors on the 10th of May, and afterwards accepted by the official assignee, (there is no suggestion that it was not then made *bona fide*,) the property of the insolvent passed by force of the statute to the official assignee. I find nothing in the Insolvent Act requiring any assent to or execution by the official assignee of the voluntary assignment to give it operation. The insolvents were enabled by the statute to

make the voluntary assignment to the official assignee, and it becomes the duty of the official assignee named therein to act upon it, in whom all the property of the insolvents is vested for the benefit of all the creditors, and for effecting the object of the Act, viz., an equal distribution of the assets among all the creditors. As I have already said, there is no pretence that the assignment was not made *bonâ fide*, and so upon this ground I am of opinion that the defendants are entitled to succeed.

Assuming, however, that the bailiff might have proceeded to sell the horses at the earliest day after he seized, and that his not doing so was a breach of duty on his part, has the plaintiff sustained any damage by the delay in the bailiff not attempting to realize the amount of the execution?

The case of *Hobson v. Thelluson*, L. R. 2 Q. B. 642, is a strong authority to shew that the plaintiff suffered no damage. That case was an action against a sheriff for not levying and for a false return, and although different in circumstances from the one before us, is quite applicable in principle. I will not set out the facts appearing in the case referred to, but merely cite a few passages from the judgments.

Elackburn, J., says, at p. 650, "I cannot doubt, when drawing inferences of fact, that if the sheriff had proceeded with the execution, and had levied and had then advertised the sale as he was bound to do under sec. 74, the very first thing that would have happened would have been that the execution would have been brought to the notice of the trustees, or some other of the creditors, and they would infallibly have made the present plaintiffs and their attorney fully aware of the deed, setting it up in all probability, as in fact they did, as a valid transfer. What, then, would have been the consequence of this state of facts? Why, that by sec. 133 of the Bankruptcy Act of 1849, the plaintiffs would have got no benefit at all from their execution; for if they had proceeded with it there would have been an adjudication of bankruptcy, and then there would have been execution levied, but not completed by sale until after notice of

the previous Act of Bankruptcy. Mr. Manisty says, that these probable facts ought not to be taken into consideration, and that we ought not to speculate on probabilities, or whether or not the creditors would have made Bower a bankrupt. If that position were followed out to its consequences, the damages would in every case be the value of the goods which ought to have been seized. But if you may take any facts into consideration which go to shew that the execution creditor would not have reaped the full advantage of his execution, I do not see why you may not take all the facts that would probably occur as against the execution creditor's *primâ facie* presumption that the damages are the full value of the goods. It appears to me, as a jurymen, an absolute certainty that notice of the act of bankruptcy would have been brought home to the plaintiffs before sale; and balancing the weight of probabilities, I think there is the strongest probability that had the defendant levied there would have been an adjudication of bankruptcy; and I accordingly draw the inference that the plaintiffs would have derived no benefit from their execution had it been proceeded with. Consequently they have suffered no damage from the defendant's breach of duty. The question remains, are they entitled to a verdict for nominal damages? I think not."

Mellor, J., said, at p. 651, "The sheriff was in default in not disregarding the deed, and levying on the goods when the warehouse was opened at 10 o'clock; but then the deed was an act of bankruptcy and could have been given in evidence to support an adjudication, as was held in the cases before Lord Westbury; and the only question is, the amount of damages. I cannot believe that the creditors would have stayed their hands, and not made Bower a bankrupt, had the plaintiffs persisted in their course, and then there would have been no benefit resulting to the plaintiffs as execution creditors, * * and as a jurymen I cannot come to any other conclusion than that the plaintiffs have suffered no damage."

Now, in the present case, the deed of assignment was executed two days before the issuing execution and delivery to the bailiff, and the complaint is, that the bailiff should have sold at the earliest day.

If the bailiff had so proceeded to execution and to sell the horses, the official assignee and the creditors would, no doubt, have stepped in to claim the horses under the deed, as, in fact, the official assignee did when they were advertised for sale under the execution, and no benefit would then have resulted to the plaintiff as execution creditor; and so here, as in the case of *Thelluson*, above cited, no damage was sustained by the plaintiff; and that being the case, upon this ground alone the defendants are entitled to have this rule discharged.

Rule discharged.

DENISON V. CUNNINGHAM.

Pound-keeper—Notice of action.

Defendant was in charge of the pound of the city of Toronto as pound-keeper, having so acted for seven or eight years. He had been appointed by the City Commissioner at a yearly salary, which had been paid until a short time before the act sued for (the impounding of plaintiff's pigs), when some question was raised as to the legality of his appointment. It appeared that after the seizure he had offered to release the pigs on payment of the pound charges only; and, according to one witness, he had said he was not pound-keeper. He had not been appointed by by-law, nor given the requisite bond. The learned Judge of the County Court, trying the case without a jury, found that defendant was acting as pound-keeper in good faith, and believed, on reasonable grounds, that he was such pound-keeper. *Held*, that the finding was fully justified, and that defendant was clearly entitled to notice of action.

APPEAL from the County Court of the County of York.

Declaration (a)—Second count, for depriving the plaintiff of the use and possession of four pigs. 2. Third count, for detaining said pigs from plaintiff. Fourth, common count.

Plea, to second and third counts—Not guilty, by statute,

(a) The first count was struck out in Chambers.

36 Vic. ch. 48, secs. 372, 38, O.; Consol. Stat. U. C., ch. 126, secs. 1, 10, 20.

To the fourth count—never indebted.

Issue.

At the trial, it appeared that the pigs had been impounded by Captain Dick for damages done in a field of his, into which the pigs had strayed. There was some evidence as to the sufficiency of the fences and the value of the pigs, which is not necessary to this report, the chief point being, whether the defendant was, or *bonâ fide* believed himself to be, a legally appointed pound-keeper, and so a public officer entitled to notice of action.

It appeared that no notice of action had been given.

It also appeared that in 1872, the defendant was appointed pound-keeper by Mr. Carr, city commissioner, in place of an old man absent from his duties, at a salary of \$120 per annum: that he had given no bond on this occasion, but when previously pound-keeper, eight or nine years ago, he had given a bond: that he received his salary from the chamberlain up to a date shortly before the impounding of these pigs, when some question of the legality of his appointment was raised; and that the appointment had been recognized by the city commissioner who succeeded Mr. Carr. The defendant had, on one occasion after seizing the pigs, offered to release them on being paid the pound charges only; and, according to one witness, he said he was not pound-keeper.

The learned County Judge, sitting without a jury, entered a verdict for the plaintiff for \$70, and reserved leave to move to set aside the verdict and enter a nonsuit, on the ground that defendant was shewn to be or to have acted in the premises as a public officer, or person fulfilling a public duty, and therefore entitled to notice of action. He found as a jury, "upon the whole evidence, that defendant acted in good faith as a public pound-keeper, believing that he was such pound-keeper, with all the rights and duties belonging to that office, and that he had reasonable grounds for such belief."

The defendant accordingly moved in term, and after argument, the learned County Court Judge gave judgment, in which, after setting out the facts and the finding above quoted, he held, under the circumstances, that the defendant "was entitled to the protection of the statute, and should have had notice of action, which notice not having been given, the rule to enter a nonsuit must be made absolute. I refer to *Davis v. Williams*, 13 C. P. 365; *Allen v. Preece*, 10 Ex. 443; *Hughes v. Buckland*, 15 M. & W. 346; *Hardwick v. Moss*, 7. H. & N. 136; *Kine v. Evershed*, 10 Q. B. 143, 150; *Hermann v. Seneschal*, 13 C. B. N. S. 392; *Braham v. Watkins*, 16 M. & W. 77, 80."

From this judgment the plaintiff appealed, on the following grounds:

1. That the judgment was erroneous, in finding that the defendant was a pound-keeper, and was entitled to a month's notice of action as a public officer..

2. That there being evidence of the plaintiff having admitted and declared that he was not appointed pound-keeper, he was not entitled to one month's notice of action as a pound-keeper.

3. That there was no proof at the trial that the defendant was, or that he *bonâ fide* believed he was, a pound-keeper.

4. That upon the pleadings in the Court below, the question as to whether the defendant was or was not a pound-keeper, &c., and entitled to notice, was not in issue, and could not be raised either at the trial or afterwards.

5. That a notice of action is not required or necessary in an action of detainue.

7. That the judgment was contrary to law and to the evidence.

G. T. Denison, for the appellant. The defendant was not a pound-keeper when the pigs were impounded. The council at the very time were withholding his salary. Even if a pound-keeper *de facto*, he should not be heard to demand notice of action, as he denied that he was a pound-keeper. There was no by-law appointing him, and he had not given a bond. The cases cited in the judgment

are distinguishable, as they are all based on an appointment. See *Tarrant v. Baker*, 14 C. B. 199; *Jones v. Williams*, 3 B. & C. 762, 771; *Sargeant v. Allen*, 29 U. C. R. 386; *Brooker v. Field*, 9 C. & P. 651; *James v. Saunders*, 4 M. & Sc. 316; *Shatwell v. Hall*, 10 M. & W., 523. As to the evidence, the defendant could not have *bond fide* believed he was a pound-keeper, when he knew his salary was withheld, and had said he was not a pound-keeper, and offered to give up the pigs without payment of damages. No notice of action is necessary in replevin: *Lewis v. Teale*, 32 U. C. R., 108. That is, because the remedy is *in rem*. Here we have a count in detinue, which is also *in rem*, so no notice of action is necessary, at all events as to that count. See also *Morgan v. Palmer*, 2 B. & C. 729.

M. C. Cameron, Q. C., contra. The defendant did not intend to deny that he was acting pound-keeper, he was acting for another person. He had not been appointed by the Board of Works, as the City Commissioner had taken on him those duties, and so no by-law or resolution was necessary. The defendant was found to be acting *bond fide*, in the belief he was a pound-keeper, and so is entitled to notice of action under the statute and cases cited by the Judge below. If defendant has acted irregularly or illegally, he is subject to action after notice, but not in trover. *Hermann v. Seneschal*, 13 C. B. 392; and *Davis v. Williams*, 13 C. P. 365, are in point.

MORRISON, J., delivered the judgment of the Court.

I retain the opinion I expressed during the argument, that this appeal should be dismissed.

The learned Judge in the Court below, who tried the case without a jury, found that the defendant in doing the acts complained of was acting as a public pound-keeper, believing that he was such with all the rights and duties belonging to the office; and that he had reasonable grounds for that belief, and that he was acting as pound-keeper in good faith.

There was abundance of proof to justify the finding of the learned Judge, for the evidence shewed that the defendant was in charge of the city pound as pound-keeper; that he was the acting pound-keeper for some seven or eight years; and that he was appointed pound-keeper by a city commissioner, at a salary of \$120 a year, the city commissioner believing he had authority so to appoint him; and that his salary was regularly paid to him as pound-keeper by the city chamberlain, to which officer he had to make a return of fees received by him. He was also recognized by a subsequent city commissioner as pound-keeper, giving him instructions as such; and he was in charge of the city pound, and fulfilled the duties appertaining to the office of pound-keeper.

Such being the fact, he was, we think, clearly entitled to notice of action.

It is, however, contended by Mr. Denison, that he was not regularly appointed in pursuance of the provisions of a city by-law, and had not given the bond required of a pound-keeper, and so was not a pound-keeper, and not entitled to notice; and he referred us to authorities deciding that a person acting as a justice of the peace, or a constable, who was not in fact a justice or constable, was not entitled to a notice of action.

These were decisions under the 22 Geo. II., ch. 22, which only protects justices of the peace and constables, and rest upon the words of the statute, which was held not to apply to persons who were not justices or constables; but our statute Consol. Stat. U. C., ch. 126, is much more comprehensive.

Section 1 provides that every action brought against any justice of the peace for any act done by him, &c., or against any other officer or person fulfilling any public duty, for any thing by him done in the performance of such public duty, &c., shall be an action on the case for tort, &c.

And by section 10, no such action shall be commenced against any justice of the peace, until one month at least after a notice in writing, &c.

And the last section, (sec. 20) provides that, so far as applicable, the whole of the Act shall apply for the protection of any officer and person mentioned in the first section, for any thing done in the execution of his office as therein expressed.

This defendant was certainly a person fulfilling, that is, performing, a public duty, and the act complained of was one done in the performance of such duty.

In *Hughes v. Buckland*, 15 M. & W. 346, Parke, B., in giving judgment, says, at p.356: "The authorities may be divided into two classes. In the first class is to be placed the case of justices, who are entitled to certain privileges by the 24 Geo. II. ch. 44, and there are other Acts applying to constables; and there, in order to obtain the benefit of the Act, the parties must be *actually* justices or constables. So, where certain powers are given by local Acts to *trustees*, the *bona fides* is immaterial, although, by a late decision of the Court of Queen's Bench, *Harrison v. Varty*, T. T. 1845, it is sufficient if they are trustees *de facto*. That disposes of all the cases except *Hopkins v. Crowe*. My brother Patteson was correct in his observation in that case, that the defendant was not entitled to protection; and the reason was, that he could not have supposed that he was the owner of the horse that had been ill-treated. There is nothing in the cases to require a different construction from that which we have given in the present case. The statute extends protection to all who *bonâ fide* and reasonably believe that they fill the character, and are authorized to act; and the defendants are in that predicament."

And in *Huggins v. Waydey et al.*, *Ib.* 357, the following case in the same volume, it was contended that the defendants were not duly appointed surveyors of highways, and so not entitled to notice.

Pollock, C. B., in giving judgment, said, at p. 358, "The case of *Hughes v. Buckland*, was decided on the words, 'any person acting in pursuance of this Act,' which appeared to the Court to be more compre-

hensive in their operation, than the words of the 24 Geo. II., ch. 44, with respect to justices. Therefore, as in that case we decided that the defendants were entitled to notice of action, although the place where the trespass was committed was out of the limits of the fishery, so, here, though there is a formal objection to the appointment of the defendants as surveyors of the highways, yet an appointment in fact was proved, and they were acting in pursuance of the Act of Parliament, under the *bonâ fide* belief that they were surveyors of the highways, and duly appointed." And a rule was refused.

In *Kine v. Evershed*, 10 Q. B. 143, Lord Denman, C. J., said, at p. 149, "The defendant, however, is said not to be a party who was acting in the execution of the act, because he was neither the owner of the house nor the owner's servant, nor acting on the owner's authority in arresting the plaintiff; good reasons undoubtedly, for holding that a party so arresting could not justify under the Act, but not necessarily sufficient for dispensing with that notice which is requisite for the protection of those who assume to carry it into execution."

I refer also to *Newton v. Ellis*, 5 E. & B. 115; *Pratt v. Hillman*, 4 B. & C. 269; *Wills v. Ody*, 2 C. M. & R. 128; *Williams v. Golding*, L. R. 1 C. P. 69; *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Selmes v. Judge et al.*, L. R. 6 Q. B. 724.

Appeal dismissed, with costs.

IN RE CANADA CENTRAL RAILWAY COMPANY AND GEORGE BROWN, REEVE OF ADMASTON.

By-law to take stock in R. W. Co.—Mandamus.

A Township Corporation passed a by-law, that the Reeve should make out debentures not exceeding \$5000, which should be sealed by the Corporate seal, and signed by him and the Treasurer; and that, provided the grading of defendants' Railway should be completed to a certain point by a day mentioned, the Reeve should subscribe for shares in defendants' Company to the extent of \$5000, on behalf of the Corporation, and deliver said debentures to the Company in payment therefor. By 36 Vic. 98, O, the by-law was confirmed.

On application for a mandamus to the Reeve to make such subscription and delivery: *Held* unnecessary to shew an agreement by the municipality to take the stock, or a written subscription, or to make the Treasurer or the Corporation parties to the application; and on the affidavits set out below the mandamus was granted with costs.

During last Michaelmas term, *C. S. Patterson*, Q. C., obtained a rule calling on George Brown, Reeve of Admaston, to shew cause why a writ of *mandamus* should not issue, commanding him as such Reeve, &c., to take and subscribe for shares in the capital stock of the Canada Central Railway Company to the extent of \$5000; and to make and deliver to the said Railway Company, in payment of the said stock, debentures for the payment of \$5000, with coupons attached for the payment of interest thereon, as he was required by by-law, No. 4, of the township of Admaston; and why he should not pay the costs of this application.

The application was based upon affidavits setting out a copy of the by-law in question, the material sections of which are as follows:—

Be it therefore enacted and ordained by the Council of the Corporation of the township of Admaston, as follows:

1st. That the Reeve for the time being of the township of Admaston shall cause debentures to be made out in sums not less than one hundred dollars each, and not to exceed in all the sum of five thousand dollars, which said debentures shall be sealed with the seal of the said corporation, and signed by the Reeve and Treasurer thereof for the time being.

2nd. The said debentures shall be made payable on the thirtieth day of September in the year of our Lord one thousand eight hundred and ninety one, at the office of the Quebec Bank in the city of Ottawa, and shall have coupons attached for the payment of the interest as it becomes due.

3rd. The said debentures shall bear interest at and after the rate of six per cent., per annum, from the date thereof, which interest shall be payable half-yearly on the second day of the months of January and July in each year, at the office of the Quebec Bank in the city of Ottawa.

5th. After the passing of this by-law, and after the grading of the *whole of the said* extension of the said line of railway to the village of Renfrew aforesaid shall have been *fully* completed, and provided the said grading shall have been so completed before the end of the present year, and not otherwise, the Reeve of the said township of Admaston for the time being shall, on behalf of the corporation of the said township of Admaston, take and subscribe for shares in the capital stock of the said Canada Central Railway Company, to the extent of five thousand dollars, and shall deliver unto the said Railway Company the said debentures in payment of said stock.

A number of affidavits were filed by the applicant, and in answer, which were contradictory as to whether the grading was completed within the time limited by the by-law, as to misrepresentation in procuring the passage of the by-law, and as to a notice to and demand upon the Reeve for the debentures, and a refusal by him.

In Easter term *Bethune* shewed cause. The Legislature have passed an Act, 36 Vic. ch. 98, O., to confirm the by-law in question; and if the effect of the Act is to make the by-law valid notwithstanding any objection, the defendant is concluded. The Act in question is however a private one, and can only be regarded as confirming the by-law as to the defect mentioned in the preamble to the Act, the indebtedness of the township of Admaston to the Consolidated Municipal Loan Fund, and the by-law is still

subject to be attacked on other grounds. The Court should not grant a *mandamus* where any doubt exists as to the right of the applicant to it. Here the evidence as to when the grading was completed was conflicting. Next the Treasurer of the council of the township should have been called on. The subscription of stock should have been in writing; in fact no agreement to take it is shewn. There must be a literal compliance with the terms of the by-law before the debentures can be demanded: *Luther v. Wood*, 19 Grant 348. The right to the debentures had been assigned, and the proper parties to apply are those who will own them when issued, and not the Railway Company. The by-law was carried by 13 votes, and thirteen voters swear that they voted under an erroneous belief as to the by-law. He cited *New Brunswick and Canada Railway and Land Co. v. Muggeridge*, 4 Drew. 686.

C.S. Patterson, Q.C., contra. The Act of the Ontario Legislature cures all the objections to the by-law. It declares the by-law, and all debentures issued under it, or to be issued under it, legal, binding, and valid. The Corporation or Council are not necessary parties, as no complaint is made against them; they have passed the by-law directing the Reeve to do the act which he refuses to do. The applicants are the proper parties to apply, and they must hand over the debentures to the parties entitled. The evidence as to the completion of the road is conflicting, but it preponderates in favor of the view that it was completed in time.

MORRISON, J., delivered the judgment of the Court.

After a careful perusal of all the affidavits filed, we are of opinion that the rule should be made absolute.

It is unnecessary to express any opinion upon the allegation that the ratepayers were induced to vote for the by-law upon a promise made by parties that other matters were to be performed than those set out in the by-law, as we think the allegation is fully met in that respect by the applicants.

Then, as to the main question and condition, whether the grading was fully completed before the end of the year 1871, in compliance with the terms of sec. 5 of the by-law, the affidavits are conflicting. Some eleven or twelve persons state that the grading was not so completed, while on the other side some sixteen affidavits are made by persons, many of them most competent to know the facts, swearing that it was duly completed within the time limited.

Among those parties who thus swear are the engineers, and the contractors, as well as the Reeves of two other townships, who passed similar by-laws with the same condition, and the Reeves of which, in pursuance of their by-laws, made and delivered to the company the debentures authorized by their by-laws, the condition of the grading by the end of the year having been performed.

The other ground upon which the Reeve of Admaston refused to comply with the by-law was, that the claim to these debentures was assigned by the company to Messrs. Smith, McDougal & Wright. This is also met by these gentlemen denying that any such assignment was made, or that they are in any way pecuniarily interested in the matter.

On the argument of the rule, several objections were taken by the defendants' counsel independent of the merits of the case, viz., that there was no agreement shewn, on the part of the municipality, to take or subscribe for stock, and that the agreement and the subscription should be in writing; and that the Treasurer, as well as the municipality, should have been parties to this application.

As to the first objection, nothing appears on the affidavits to shew that there was not such an agreement; and we think we may fairly assume that there was an agreement between the railway company and the corporation, that the latter would subscribe for the stock, &c., on the condition set out in the fifth clause of the by-law.

If the by-law is defective in not shewing such an agreement, 36 Vic., ch. 98, O., sets at rest all doubts as to the validity and legality of the by-law and the debentures authorized to be issued; for by the first section it is declared,

"By-law numbered four," (the by-law in question) passed by the corporation of the township of Admaston, and intituled, 'A by-law to authorize the issue of debentures to enable the corporation of the township of Admaston to subscribe for \$5,000 in the capital stock of the Canada Central Railway'; and all debentures issued, or that may be issued under said by-law, be and the same are hereby declared legal, binding and valid upon the said township of Admaston, and all others whatsoever, any law or statute to the contrary notwithstanding."

We see nothing in the objection that the subscription of stock should be in writing. The subscription could not be made until after the passage of the by-law, which authorized it to be done upon performance of the condition mentioned in the fifth clause, when it became the duty of the Reeve to subscribe for the stock and make the debentures.

Neither do we think it any ground of objection on the part of the defendant, that the Treasurer is not a party to the application. For all that appears, the Treasurer is quite ready and willing to sign the debentures, as required by the by-law, so soon as they are prepared and made out by the Reeve and signed by him, as provided by the first section of the by-law.

As to the corporation, it has passed the by-law, and no further duty is imposed on it; but even if it were necessary that the Treasurer and corporation ought to be joined, we should only amend and enlarge the rule, so that they might be called upon.

We may now assume, as the application is disposed of on the merits, that the officers of the corporation will comply with the provisions of the by-law.

On the whole, we are of opinion that the railway company is entitled to have their rule made absolute, with costs.

Rule absolute, with costs.

DULLEA V. TAYLOR.

Contract to buy land and erect a factory—Breach—Measure of damages.

Defendant on the 14th of March, 1872, agreed to buy two acres of land in a village from the plaintiff, for \$325, and to complete upon it within 18 months a brick factory of specified dimensions, and at or before its completion to commence and prosecute therein the manufacture of plated ware on a scale commensurate with its size; and that in case he should not perform his agreement in this respect he would at the end of the 18 months reconvey the land to the plaintiff, receiving back the purchase money, \$325, and compensating the plaintiff for damages, if any. The defendant did not pay the purchase money, and at the end of 16 months elected not to go on with the agreement, whereupon the plaintiff sued, alleging in his declaration that the plaintiff's adjoining land would have been much enhanced in value by the sale to defendant, and the erection of the factory, and claiming as damages profits which he would have derived therefrom.

Held, that such damages were not recoverable, being altogether too remote.

Quære, whether he could recover interest, though he had demanded the \$325, for he had not offered at the time to make a conveyance.

THE declaration is set out in 34 U. C. R. 12.

It was on an agreement by the plaintiff to sell to defendant certain land, on which within 18 months defendant was to build a factory, but which he refused to do before that time, and abandoned the agreement.

The declaration alleged that the adjoining land of the plaintiff would become of much greater value in consequence of the sale of the portion to the defendant, and the erection thereon of the said building by the defendant.

And the plaintiff alleged that the defendant did not pay the purchase money, and that he abandoned the agreement and would not complete it or any part of it, whereby the plaintiff was put to expense in endeavouring to perform the agreement, and in endeavouring to procure the performance of it by the defendant, and had lost the profits he would have derived from the sale of his other land at an increased price.

The only plea on which issue in fact was joined, was that the defendant did not refuse to pay the plaintiff the purchase money or to complete the purchase on his part, nor did he notify the plaintiff he had abandoned the agreement, and would not perform it or any part of it.

The cause was tried before Stephen Richards, Q. C., sitting for Gwynne, J., at the Assizes held at Whitby last spring.

The agreement was put in, dated the 14th of March, 1872. Under it, the defendant agreed to buy $2\frac{1}{10}\frac{9}{10}$ acres of land in the village of Oshawa from the plaintiff, for \$325, and to complete upon the land within eighteen months from the date a brick factory 100 ft. by 40 ft., three stories, or, at the option of the plaintiff, 150 ft. long, and from 40 to 50 feet wide, two stories; and, at or before such completion, to commence and prosecute therein the manufacture of plated ware, on a scale commensurate with the size of the building. And in case he did not perform his agreement in this respect, he would, at the expiration of the eighteen months, reconvey the land to the plaintiff, receiving back his purchase money of \$325, and compensating the plaintiff for damages, if any; such compensation to be ascertained by arbitration in the usual manner. The purchase money to be paid, and the conveyance to be executed on demand. The present fences to be removed by plaintiff, and the defendant to fence the land so sold, by the 1st of November.

The plaintiff remained in possession, defendant paid nothing, and after sixteen months abandoned the sale and did not complete the agreement.

The learned Queen's Counsel directed the jury that the plaintiff was entitled to sixteen months interest on the \$325, being up to the time the defendant declined to take the land—which sum was \$26 00

And that, as the plaintiff had kept possession of the land, he should allow for that, at the sum sworn to \$5 an acre. 10 00

Leaving..... \$16 00

And if the plaintiff was entitled to receive anything for being induced not to fence the rest of his land, in consequence of his contract with the defendant, to say what that sum should be.

The jury found the amount to be \$12, which the plaintiff had leave to add to his verdict, if the Court thought him entitled to receive it.

The charge was objected to, because it was contended the plaintiff was entitled to recover damages based on the increased value that would have been given to the plaintiff's property if the factory had been erected and put in operation; and the learned Queen's Counsel declined to direct the jury to consider that claim, and refused to receive evidence upon it.

The jury found a verdict for the plaintiff and \$16 damages.

In Easter Term last, *Harrison*, Q. C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a new trial had for smallness of damages, and for misdirection leading to the smallness of damages, which misdirection was, in ruling that the plaintiff was only entitled to recover in respect of loss of interest on \$325, less the annual value of the land; and was not entitled to recover anything for the increased expense of fencing the plaintiff's land, or any part of it, nor for the loss of the advantage which the erection of the factory mentioned in the agreement would, if it had been performed, have been to the plaintiff, nor for any other damage whatever.

In this term, *Beaty*, Q. C., shewed cause. The plaintiff is not entitled to recover damages for the defendant not building the factory as he engaged to do: *Walker v. Moore*, 10 B. & C. 416; *Mayne on Damages*, 2nd ed., 140; *Laird v. Pim*, 7 M. & W. 474; *Bain v. Fothergill*, L. R. 6 Ex. 59. The plaintiff is not entitled to the \$12, relating to the fencing, for the agreement expressly provides that the defendant might give up the bargain altogether within eighteen months, which he did do, and before the time for fencing had arrived.

Osler supported the rule. The general rule as to damages in such a case is stated in *Robinson v. Harman*, 1 Ex. 850; *Icely v. Grew*, 6 N. & M. 467; *Engel v. Fitch* L. R. 3 Q. B. 314, 330; *Wall v. The City of London Real Property Co., Limited*, L. R. 9 Q. B. 249. If the defendant, had carried out his engagement to build and put in opera-

tion the factory, the plaintiff would have gained largely by it, and he should be indemnified for what he bargained for.

WILSON, J., delivered the judgment of the Court.

The rule taken out in this case has no reference to the \$12 relating to the fencing. Probably the plaintiff regarded it as of minor consequence, and desired merely to argue his right to damages for the neglect to erect and put in operation the factory.

I am not satisfied the plaintiff was entitled to recover interest at all, although he demanded his money, for he did not tender or offer to make a conveyance at the time to the defendant, for I think the payment and the conveyance were plainly concurring acts, and the one party could not require performance by the other without his offering at the same time to do all that was necessary on his part. The defendant has not disputed that sum on his part, and no doubt is content to let it rest.

The defendant had the right at any time within eighteen months, or, as it is expressed in the agreement, "in case he did not perform his agreement in this respect, he will, at the expiration of said eighteen months, reconvey the said land to Dullea, receiving back his purchase money, and compensating the said Dullea for damages, if any."

The defendant within the eighteen months elected not to perform his agreement. The land had not been conveyed nor the money paid, so neither of these acts had to be undone ; and now arises the question as to "compensating Dullea for damages if any."

What damages are they which are alluded to ? They are damages "in this respect." In what respect ? That question is answered by what immediately goes before, the clause referred to in the contract. It is expressed thus : "And the said Taylor agrees with Dullea, that he will, within eighteen months from the date hereof, complete upon the said land a brick factory," (giving the dimensions)—"And, at or before such completion, commence and prosecute therein the manufacture of plated ware, on a scale commensurate with the size of the said building."

The fact that the defendant had eighteen months within which to do these acts, and the right, or what is equivalent to it, not to do them, no conveyance or payment having been made, upon compensating the plaintiff for damages if any, will not excuse the defendant from payment of damages, because the case happened as provided for, that he did not perform his agreement—for it is also expressly provided that he shall compensate the plaintiff in damages.

Now, the damages in question are not for the non-acceptance of the title, but for not completing the factory, and not commencing and prosecuting therein the manufacture of plated ware on a scale commensurate with the size of the building.

I do not see why the plaintiff should not recover such damages as he may have sustained, be they more or less, by the non-performance of the engagement or covenant, when the defendant has expressly bound himself to do these acts, and to pay damages if there be any resulting from his non-performance.

But the damage laid is, that “the plaintiff lost and was deprived of the profits which he might and would have derived from the sale of *the other lands* of the plaintiff at an increased price,” that is, of the land of the plaintiff adjoining the land contracted to be sold to the defendant.

No other damage is laid nor in question than as stated; and the question is, are these damages recoverable, or are they too much?

It is most likely the erection of the factory and the prosecution of the business in it would have benefited the plaintiff by enhancing the value of his adjoining property. But the adjoining property had nothing to do with this contract.

It made no matter to the defendant who bought or owned the adjoining property.

If the defendant had built the factory, and had not prosecuted the business in it on a scale commensurate with the building,—had only 50 hands instead of 100 hands,—

what would be the damage to the plaintiff? The defendant might not be able to carry on a larger business, although the building was on a scale adapted for a larger business.

How long was the defendant to carry on the business? There is no limit of time. If the defendant failed in business after carrying it on for a few years, would he then be liable to an action for not prosecuting the business? Or if the defendant converted it into a tannery a few years afterwards, would he be liable? Or if he pulled the building down, or sold it to some other person who did not carry on the business of plating ware in it, would he be liable? I am very much inclined to think he would not.

But I certainly think that the loss of profits to the other land is altogether too remote. This is not the natural and reasonable result of the defendant's acts. It is not a loss or consequence flowing from the contract about this piece of land. A person who is not paid money due to him, is in fact damaged more than the interest makes up to him; he is prevented from paying his own debts. A person who is arrested may actually be damaged more than he is compensated for; he may have lost a commission by it, or have been prevented from getting a situation or employment; or a person who has failed to deliver a specific article, or a part of a machine without which the rest is of no use, may have sustained very great loss, yet all he can get is the cost of supplying it elsewhere unless the other party agreed to become responsible for more.

On this last point, I may refer to *British Columbia, &c., Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 508, 509; *Hoey v. Felton*, 11 C. B. N. S. 142; *Rigby v. Hewitt*, 5 Ex. 240; *Williams v. Reynolds*, 6 B. & S. 495. Yet in these and in many similar cases the law can give no relief.

The plaintiff might as well have alleged that he had a house adjoining this land agreed to be sold, which would have been taken by a bank at a rental of \$1,000 a year if the defendant had built the factory and prosecuted his business in it; or that he would have been enabled to open a mine or stone quarry on the adjoining

land to advantage; or that an hotel he had on the adjoining land, would have had the custom and profit of the defendant's men employed in the factory; or, indeed, anything else which he no doubt contemplated would enhance the value of his other property, and be beneficial to him by the improvement of the purchased land, and the appropriation of it to a business which would necessitate the employment of many men, and the expenditure of a large amount of money.

But did the defendant ever contract that he was to be answerable to the plaintiff for the loss or disappointment of such visions of wealth or added gain by this purchaser for \$325, and by his engaging to put up a factory, and set it in operation?

The damages suggested at the trial, which the plaintiff claimed, were \$10,000, or thirty times the cost of the land. The defendant, it is said, stated that his works would increase the value of the plaintiff's other land by that sum, and they may have done so; but did he engage to pay \$10,000 or any such sum if he failed to perform his contract? I think he did not.

In my opinion the defendant is liable for damages for having broken the covenant to build and put the business in operation, simply because he covenanted to do so.

How the damages in such a case would have been, or should have been estimated for the non-performance of these acts, it is difficult to say. But I am of opinion it is not by a reference to or an estimate as to what the plaintiff's other land, of about 75 acres, might have been increased in value by the performance of their covenant that the compensation is to be made.

The defendant had nothing to do with the other land, and unless we see that he engaged to make good the loss according to the plaintiff's method of reference and computation, he cannot be liable for not improving the value of that other land; and it is in that way, and for that purpose only, he has framed his title to damages in the declaration.

We do not open up the case for the mere purpose of allowing the plaintiff the benefit of nominal damages, because he has not brought his action for the nominal breach of covenant.

The rule will, therefore, be discharged.

Rule discharged.

EMILY M. BOULTON v. HUGEL AND BICKFORD.

Sale of stock—Note for purchase money—Omission to assign part—Preparation of transfer—Practice under Administration of Justice Act, 1873.

To a declaration against maker and endorser of a note, defendants pleaded separately, that before the making of the note the plaintiff and her husband sold all their interest and stock in a certain railway company to defendant, H., for \$55,000, and in consideration that the plaintiff and her husband should assign, convey, assure, and transfer the same to H., H. agreed to pay said \$55,000 on certain days, and to give his notes therefor endorsed by the other defendant, B., and that until the whole of the said stock, &c., had been conveyed to H. neither H. nor the other defendant should be required to pay said notes or any part thereof: that this was one of the notes, and was made on the faith that the stock had been conveyed; and that afterwards the plaintiff and her husband refused to complete the conveyance of all their stock, and only assigned part thereof, and retained thirty shares.

The plaintiff replied that at the time of making said agreement, and from thence hitherto, she and her husband were, and still are, ready and willing, and hereby offer to assign to H. said thirty shares, on his request, of which he had notice, but that H. never requested such transfer.

Held, on demurrer to this replication, 1. That if no conveyance had ever been executed it would have been the duty of H. to prepare the necessary transfer for execution; but, 2. That the plaintiff having conveyed all that she professed to have in the company, it was her duty to prepare, at her own cost, the extra conveyance of the thirty shares rendered necessary by her own default in not transferring them before.

Seemle, that under the Administration of Justice Act, 1873, if all the other issues had been disposed of, the Court might have allowed the plaintiff to convey the thirty shares, paying the costs of suit, and directed the defendant then to pay the note, and that the plaintiff's husband should be made a party; but there being other issues to be tried judgment was given for defendants on demurrer, reserving judgment on the equitable rights of the parties.

DEMURRER. Declaration against maker and indorser of a promissory note dated 10th of April, 1873, for \$2,500, payable at nine months.

Fourth plea, on equitable grounds, (the defendants pleading separately): that before the making of the note the plaintiff and her husband D'Arcy E. Boulton sold to defendant Hugel all their interest in the Midland Railway of Canada, including all stock or shares therein held by them or either of them, or held by any other person or persons for or on account of or in trust for them or either of them, for the sum of \$55,000; and in consideration that the plaintiff and her husband should assign, convey, assure, and transfer to Hugel all their interest in the railway company, and the stock and shares aforesaid, to the said Hugel, the said Hugel agreed with the plaintiff and her husband to pay the said sum of \$55,000 to the plaintiff on certain days and times agreed upon, and to give his promissory notes endorsed by the other defendant E. O. Bickford, who agreed to endorse the same for the accommodation of Hugel, and as surety for Hugel's securing payment of part of the sum of \$55,000, and that until the whole of the interest in the railway company and the stock and shares aforesaid had been conveyed, &c., to Hugel, neither Hugel nor the other defendant should be called upon, or liable upon, or required to pay the said notes or any part thereof. And the defendant Hugel says that the note in the declaration mentioned was one of the notes so agreed by him to be given to the plaintiff as and for part of the purchase money and consideration to be paid to the plaintiff for the said interest in the railway company and the stock and shares aforesaid so sold and conveyed to him, and that the note was made and delivered by him to the plaintiff on the faith that the said interest in the railway company and the said stock and shares had been conveyed, &c., to him; and that after the said notes had been so made and delivered to the plaintiff, and before the said notes became due, the plaintiff and her husband refused to complete the conveyance, &c., of their interest in the railway company and of the stock and shares aforesaid, and only assigned, &c., part thereof, and wholly neglected and refused to assign the whole of their interest aforesaid in the railway company and the stock and shares aforesaid, but have on the contrary retained

and held and still retain and hold thirty shares in the said company, and by reason thereof the defendants are not liable to pay the said note or any part thereof; and that except as aforesaid there never was any value or consideration for the making and delivery or payment of the said note by the defendants.

The plaintiff replied separately to the separate pleas of the defendants, on equitable grounds, that at the time of the making of the said sale and agreement, and at all times from thence hitherto the plaintiff and her husband and each of them, and the person who during all the times aforesaid held the said thirty shares of the said company were, and have been, and still are ready and willing, and hereby offer to assign, &c., to Hugel, or his appointee, the said thirty shares, upon his request, of all which he had notice at the time aforesaid, but that Hugel never during all the times aforesaid, or hitherto, applied to or requested either the plaintiff or her husband, or the person who held and holds the said thirty shares, to transfer the same or any part thereof.

The defendants separately demurred to the separate replications, on the following grounds:

That the replication, while confessing the matters set forth in the fourth plea, does not avoid the same or afford any answer thereto.

That the replication is a departure from the declaration, and admits the matter set out in the fourth plea, and as matters and conditions precedent to the plaintiff's right or cause of action remaining unperformed.

The plaintiff joined in demurrer, and gave notice of the following exceptions to the fourth plea: That it is no answer to the declaration.

That it is inconsistent and repugnant, because in one part the defendants allege a default in the plaintiff before the making, endorsing and delivery by the defendants of the note sued upon, and in another part thereof they state a default after that time.

That if the plea discloses a defence it is a legal defence, and should not have been pleaded on equitable grounds.

MacLennan, Q. C., for the plaintiff. It was Hugel's duty to prepare the instrument of transfer or conveyance of the shares which were to be assigned, and the replication is a good answer to the plea. It states all that it was incumbent on the plaintiff to do: that she was always ready and willing to assign the shares upon request, and is still ready and willing and now offers to do so, but that she was never requested to assign. As this suit has become by the pleading an equitable proceeding the suit will not now fail, as it formerly would have done, if the plea is found to be a good answer. The plaintiff will now be decreed her money which she sues for upon perfecting the title of Hugel and conveying to him the thirty shares in question. Hugel has in fact the title to the shares already in equity, because he has a contract for their conveyance, and that is of itself a transfer of them. The plea is defective also because it sets up the partial failure of consideration as a defence to the whole amount of the note: *Byles on Bills*, 11th ed. 128, 129, 130; *Bayley on Bills*, 6th ed. 506: *Agra and Masterman's Bank (Limited) v. Leighton*, L. R. 2 Ex. 56.

Hector Cameron, Q. C., for Bickford. The plaintiff should have conveyed the shares and tendered the conveyance to Hugel: *Jones v. Jones*, 6 M. & W. 84; *Rogers v. Lake*, 9 U. C. R. 264; *Smith v. Doan*, 15 U. C. R. 634; *Sugd. V. & P.*, 14th ed., 241. This is not the case of a partial failure of consideration, but of the non performance of a condition precedent.

J. K. Kerr for Hugel. The plea is a good defence. It shews the note was not to be paid till the assignment was made of the interest and shares and stock bargained for in the railway; and it shews not only that the assignment has not been made of the thirty shares, but that the plaintiff and her husband refused to assign the shares. The replication does not deny the refusal, nor does it say the plaintiff was *always* ready and willing to assign, but only that she was ready and willing. It was the plaintiff's duty to make and tender the conveyance of the shares, because she engaged to assign, convey, assure, and transfer them; it would have

been otherwise if she had agreed only to execute a conveyance: *Glazebrook v. Woodrow*, 8 T. R. 366; *Clarke v. McKay*, 32 U. C. R. 583. There is no case which shews that if a party commence a suit or file a bill before he is entitled to do so, and the defendant shews that fact, that the plaintiff will still get the benefit of his suit if he will nevertheless complete, pending the suit, that which he should have done before beginning his suit. The bill in equity in such a case, as the suit at law would also, would fail altogether.

MacLennan, Q. C., in reply—The plaintiff does shew she has *always* been ready and willing to assign, because she says that at the time of making the sale and agreement, and at all times from thence hitherto, she has been ready and willing, and still is so.

And as to the offer now to assign, it is perfectly plain that in equity the bill in such a case would not be dismissed even if the plea be a good defence, but that the Court would proceed to a determination of the rights of the parties by decreeing if necessary a conveyance now to be made, and by decreeing to the plaintiff the payment of her money.

WILSON, J., delivered the judgment of the Court.

The plea is not one shewing only a partial failure of consideration; it shews a defence according to the very terms of the agreement, "that until the whole of the interest in the railway company, and the stock and shares aforesaid had been conveyed to Hugel, neither Hugel nor the other defendant should be called upon or required to pay the said notes or any part thereof." It shews a condition or assumes to set up a condition precedent unperformed by the plaintiff: *Chanter v. Leese*, 4 M. & W. 295, 5 M. & W. 698.

It is different from the case of *Boone v. Eyre*, 1 H. Bl. 273. note (a), 2 W. Bl. 1312, where the covenant was that A. well and truly performing all and everything therein contained on his part to be performed, he, B., would pay the annuity; and A. had not performed all his covenants, for he had not, as he alleged he had, a good title to a part of the property

conveyed ; and yet the Court determined that A. having conveyed a part of the property, it was not just B. should retain that property and pay nothing, because A. had not a good title to another part of the property ; and that the damages of the two would be unequal, for while A. would lose the money for the sale, B.'s damage might consist perhaps in the loss only of a small part of the property ; and these covenants were held to be independent, in which cases other party could be compensated in damages for what he failed to get according to the agreement. See *Pordage v. Cole*, 1 Wms. Saund. 548, 553, notes ; *McAndrew v. Chapple*, L. R. 1 C. P. 643 ; *Jeston v. Key*, L. R. 6 Ch. 610.

Then was it the duty of Hugel, or of the plaintiff and her husband, to make and tender the conveyance of the shares to the other ?

The plea and replication both admit that while the plaintiff and her husband were to have conveyed to Hugel all their interest in the company, and in the stock and shares, they conveyed only a part of the subject of sale to him, and that they retained thirty shares which they did not convey.

There is no difference between the sale of personal property and of real property, if a conveyance be required or be necessary for its transfer, as to the rule who shall prepare and tender the conveyance for execution. In all these cases it is for the purchaser to do so : *Stephens v. DeMedina*, 4 Q. B. 422.

In this last case, the plaintiff agreed to buy from the defendant, and the defendant bargained and sold certain railway shares to the plaintiff, * * * to be made over and transferred by the defendant to the plaintiff in a reasonable time ; and the defendant, for the said consideration, promised to do so. The declaration then averred that, although the plaintiff was ready and willing to pay for the shares, and although a reasonable time had elapsed for the defendant to make over and transfer the shares, to the plaintiff and although the plaintiff requested the defendant to make over and transfer the shares to him, and although the plaintiff was willing to accept the same, yet the defendant did not,

when requested, or at any time, make over or transfer the shares. The defendant demurred, because the plaintiff had not alleged that he had tendered a conveyance to the defendant to be executed by him of the shares. The plaintiff's counsel urged on the argument, that there was "a direct engagement by the defendant to do the act of conveying, which binds him independently of any tender by the plaintiff. * * * The intention is clear that the act of conveying should originate with the party who was to make the transfer." The Court gave judgment against the plaintiff, notwithstanding the view of his liability presented by his counsel, and without observing upon it in any way.

If the vendor sue for the purchase money, he must aver a readiness and willingness to have executed a conveyance. He need not, unless under special circumstances, tender a conveyance: *Poole v. Hill*, 6 M. & W. 835; *Peeters v. Opie*, 3 Saund. 352, (b) note (c); *The Thames Haven Dock & R. W. Co. v. Brymer*, 5 Ex. 696, 711.

The case of *Rogers v. Lake*, 9 U. C. R. 264, decided that when the vendor engaged in the condition of a bond well and truly to make and execute a deed, he was by that language bound to make the conveyance and tender it to the vendee. That was a bond, and perhaps there is a difference when the obligor must relieve himself from the penalty he has placed himself under to the act stipulated for, and the ordinary case of a mere covenant or agreement.

In such cases the vendor engaging to convey does not bind himself to execute and tender the conveyance: *Stephens v. DeMedina*, 4 Q. B. 422; and there is no difference therefore between a vendor engaging to convey the land and one who engages only to execute a deed.

There is just the same difficulty in the way of the vendor preparing the conveyance—I speak now of land, but chattels and stocks are governed by the like rule—when he is to convey, as when he is to execute a deed, and the one expression more than the other should not cast upon the vendor a different responsibility. He has to convey of course in every case where he says he will execute a deed, and there is no

reason for making him prepare the deed and tender it, when he says he will convey, merely because he says he will do what in every case he must do.

I am of opinion, as an abstract proposition, that when one engages to convey to another, he does not assume the responsibility of drawing and tendering the conveyance of the subject of the bargain to the purchaser.

This case is not one precisely of that plain and direct nature, for here it is provided that until the whole of the interest of the plaintiff and of her husband in the company and in the stock and shares were conveyed to Hugel, he should not be called upon or be liable, or be required to pay the notes or any part of them.

Yet I do not think that provision has shifted the burden from Hugel to the plaintiff to prepare the conveyance.

It appears to me if no conveyance had ever been executed, the plaintiff on this agreement, might have maintained an action against Hugel for damages, for not completing his purchase, by alleging she had always been ready and willing to convey, and that a reasonable time had elapsed from the making of the contract, and before the commencement of the suit, to have enabled Hugel to draw the necessary conveyance for the plaintiff and her husband to execute, and that he had not done so.

It is only damages and not the purchase money which could be recovered in such a case, for while the vendor holds the property he cannot get the value of it too: *Laird v. Pim*, 7 M. & W. 474; *Baggallay v. Pettit*, 5 C. B. N. S. 637, per Willes, J., at p. 640.

It appears, however, on the pleadings sufficiently that the plaintiff has conveyed all the property but the thirty shares; and while the defendants say she refused to convey them, although requested to do so, she, without directly traversing that, says (in substance) she was always ready and willing to convey them, and now offers to do so. That is, no doubt, a very informal and argumentative traverse.

The plea should have been demurred to if the plaintiff meant to contend that it was the defendant's place to pre-

pare and tender the conveyance, because the plea has not averred that Hugel did do so.

Still the replication is right in asserting as a general proposition that she, as a vendor, was under no greater obligation than to be always ready and willing to execute the conveyance when it was tendered to her.

But this is not the ordinary case of a contention on that point between a vendor and vendee.

Here a conveyance has been made of all the property but the thirty shares. The defendants say the plaintiff and her husband, although they assigned a part, refused to assign these shares and retained them. And the plaintiff admits the conveyance as alleged, and also that Hugel has not got the thirty shares.

Now the plaintiff cannot, under these circumstances, have always been ready to assign, for when she and her husband made the conveyance they not only did not convey the thirty shares, but she gives no reason why they did not then convey them, nor why the shares have been withheld from Hugel to this time.

After the conveyance made to Hugel of all the plaintiff and her husband professed to have in this company, it must rest on the plaintiff to perfect what she had left imperfect. Hugel cannot be expected to draw a fresh conveyance for every share he may from time to time discover to have been withheld from him. I think it was the plaintiff's duty as to these thirty shares to have made and executed the conveyance of them, upon request to do so at any rate.

From the special circumstances appearing in the plea and replication I am of opinion the defendants are right in contending that the extra or supplementary conveyance rendered necessary by the plaintiff's own act or default need not have been prepared by Hugel and at his expense, as he was not in fault, but should have been drawn and perfected and tendered by the plaintiff and at her expense, because she was in fault; and that the plea is therefore right, under these circumstances, in charging the duty on the plaintiff to make the conveyance of these shares to Hugel at her own expense.

If one engage to make a deed at his own expense he is bound to prepare it: *Price v. Williams*, 1 M. & W. 6; *The Thames Haven Dock & R.W.Co. v. Brymer*, 5 Ex. 696, 710; *Clarke v. McKay*, 32 U. C. R. 583.

The next question is, whether judgment should be given generally for the defendants on this demurrer and be a bar to this action, or whether we must go on and decree that the plaintiff shall now execute the necessary conveyance to Hugel of these shares, and then further decree that Hugel shall pay the amount of the note sued upon.

In the Courts of Equity the practice is said to be that a plaintiff must clearly shew he has a right to the thing demanded so as to entitle him to maintain a suit concerning it, and if there be anything preliminary to be done before commencing the suit necessary to his maintaining it he must shew that such thing was done, and he must aver the performance of it in his bill.

If the bill be defective in any of these respects the defendant may demur to it.

I refer to 1 *Daniell's Ch. Pr.*, 5th ed., 267 to 272. There are various forms of demurrer and of pleas in *Willis on Pleading* for these causes.

I presume there can be no doubt of that being the general rule of the Court; it is consistent with reason and convenience.

But there are cases in which the plaintiff has been allowed to perfect his case or title which was imperfect at the beginning of the suit.

It is not allowable that A shall contract to sell the land of B, and on its appearing to his bill for specific performance against his vendee that he has no title, to permit him to acquire a title and still to maintain his suit: *Sugd. V. & P.*, 14 h ed., 217; *Chamberlain v. Lee*, 10 Sim. 444, 450.

The Court however does allow some aid to parties to supplement their case pending the suit.

In *Wilson v. Williams*, 3 Jur. N. S. 810, Sir W. P. Wood, V. C., said, at p. 811: "According to the observations in *Mortlock v. Buller*, 10 Ves. 292, 315, this Court has allowed a vendor who has contracted without any title at

all, to sustain a bill, if he can acquire a good title before the report on the decree, and to take steps even pending litigation to perfect his title, even by going so far as to obtain a private Act of Parliament for that purpose."

In *Beaumont v. Dukes*, 1 Jacob, 422, 424, the Master of the Rolls said, at p. 424: "The defendant here has made two objections in his answer; first, that the plaintiff's title was imperfect. * * As to the first point, it appears that the title is now complete, though it was not at the time of filing the bill; that, however, goes to costs only, and not to the main point of specific performance."

In *Hunter v. Daniel*, 4 Hare 420, V. C. Wigram said, at p. 433: "The only remaining point insisted upon was, that the making of every payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, or in fact to call for the benefit of it; and it was argued that the bill could not properly be filed before the plaintiff had, out of Court, fully performed his agreement. The general rule in equity is certainly not of that strict character. A party on filing a bill submits to do every thing that is required of him. * * This Court disposes of the whole matter at once."

In *Hoggart v. Scott*, 1 R. & My. 293, the Master of the Rolls said, "An objection was taken at the hearing, that the plaintiffs, at the time of the contract, had no power of sale, and that the contract, therefore, could not be enforced. The objection must be overruled. The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title, but, he not having taken that course, it is enough that at the hearing a good title can be made." *Salisbury v. Htcher*, 2 Y. & C. C.C., 54, is to the same effect.

In *Chamberlain v. Lee*, 10 Sim. 444, where one agreed to sell an estate and it was afterwards discovered that a small portion of it was the property of another person, the Court would not discharge the purchaser from his contract without giving to the vendor an opportunity of acquiring a title to

that portion. See also *Eyston v. Simonds*, 1 Y. & C.C.C., 608; *Adams v. Broke*, 1 Y. & C. C. C., 627; *Graham v. Oliver*, 3 Beav. 124; *Sugd. V. & P.*, 14th ed., 218.

In this case the defendant Hugel has acquired all the title of the plaintiff and of her husband in the railway company, and in the stock and shares bargained for, excepting thirty shares, which may probably be of no great value estimated at money's worth, although it may be of great consequence to Hugel that he should have the title to and control over every one of these shares; and it would seem scarcely right, if we can help it, to turn the plaintiff out of Court without redress of any kind when all can be put right between these parties by ordering that the thirty shares shall be fully conveyed to Hugel, and that Hugel shall then pay the amount of the note which is sued upon to the plaintiff.

If the plaintiff could have got her present demand before the Court of Equity, and it had appeared as an impediment in her way that she had not conveyed the shares now demanded by Hugel, the Court would not, I think, if she had averred her readiness and willingness to transfer them, and offered to transfer them, have dismissed her bill, but would, on the authorities which have been referred to, have allowed her to make the conveyance of the shares and have accepted that as a full performance of her contract, subject to the question of costs, and would then have decreed payment of the amount of the note by Hugel.

Has this Court the power so to direct, for I am of opinion we ought to do so if we have the power to do it?

By the Administration of Justice Act, 1873, "The courts of law and equity shall be, as far as possible, auxiliary to one another respectively for the more speedy, convenient, and inexpensive administration of justice in every case."—Sec. 1.

And "Any party to an action at law, may, by plea or any subsequent pleading, set up facts which entitle him to relief upon equitable grounds."—Sec. 3.

And, by sec. 8, "For the purpose of carrying into effect the objects of this Act, and for causing complete and final justice

to be done in all matters in question in any action at law, the Court or a Judge thereof, according to the circumstances of the case, may, at the trial or at any other stage of an action or other proceeding, pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require; and may make such rule or order * * * as to costs, * * * and may as fully dispose of the rights and matters in question as a Court of Equity could do."

Under these enactments, we must certainly have the power, and if so it is our duty to exercise that power, and to dispose of the suit in such a manner "as the equitable rights of the parties respectively require."

If the case were now ripe for final judgment—that is, if all the other issues between the parties were disposed of, and the case stood just as it now appears before us—we would pronounce judgment and make an order and decree according to the Administration of Justice Act, 1873, as follows:

That the plaintiff and her husband shall convey, assign, assure, and transfer unto the defendant, Adolph Hugel, the thirty shares in the capital stock of the said railway company.

And that after such conveyance shall have been made and executed, and delivered or tendered to the said Adolph Hugel, that the said Adolph Hugel and the said Edgar Oscar Bickford shall then immediately pay to the plaintiff the amount of the said promissory note sued upon, with interest thereon at six per cent. per annum from the maturity of the note.

And that the plaintiff do pay the costs of this suit to the defendants.

And that the said D'Arcy Edward Boulton, for the purposes of the judgment, order and decree, be made a party plaintiff to this suit.

We must therefore pronounce a contingent judgment as above, subject to the manner in which the disposal of the other issues may affect our order; or we must pronounce a merely legal judgment, without regard to the equities of the

parties in the meantime, until we are in a position by the trial of the other issues to dispose of the case by a final judgment. The latter course appears to us to be the most convenient, indeed the only one we can adopt; and therefore we give judgment on the demurrer to the replication for the defendants, and reserve our judgment on the equitable rights of the parties until the other issues are determined.

I may add that we should have been glad if the gentlemen who argued this case, and who are well informed in Chancery matters, had aided us by a reference to those works and decisions which each of them was so certain were so much in his favor. It is a practice and system of law with which we are necessarily not very familiar, and in which we require all the assistance which can properly, and should properly, be given to us.

Judgment for defendants on demurrer.

KEAN ET AL. DROPE.

Deed—Description of land—Latent ambiguity—Parol evidence.

Defendant, owning a block of land which had been laid out in village lots, conveyed it to S., the plaintiffs' grantor, reserving thereout several village lots, and among them lots 1, 2, and 3, on the south side of Queen street, in tier 2. There was in fact no such lot 1 laid out, either on the plan of the village or on the ground, the first lot on the south side of Queen street being No. 2. S., in 1870, conveyed to the plaintiffs part of village lot 4, on the south side of Queen street, in tier 2. The adjoining lot, 5, was then pointed out to the plaintiffs as being 4, and they built upon it, defendant occupying 2, 3, and 4, and having a blacksmith's shop on 4, which lot he had occupied ever since his sale to S., as one of the reserved lots. The plaintiffs having brought ejectment for lot 4: *Held*,—Richards, C. J., doubting,—that, as the extrinsic evidence, shewing that there was no lot 1, disclosed a mistake in the description of the lots reserved and a latent ambiguity, parol evidence might be received to explain it; and that the reservation might be construed as meaning lots 2, 3, and 4, or the first, second and third lots on that side of the street.

Ejectment for part of village lot 4, in the village of Harwood, on the west side of the travelled road, running

parallel to the Cobourg, Peterborough, and Marmora and R. W. Co., and in tier 2 of said village, and south of the line dividing the said tier into two ranges of lots, and also 66 feet of the south part of lot 4, on the south side of Queen street, in the said village, and in said tier 2, and north of the dividing line.

The cause was tried before Wilson, J., without a jury, at the Cobourg Spring Assizes, 1872.

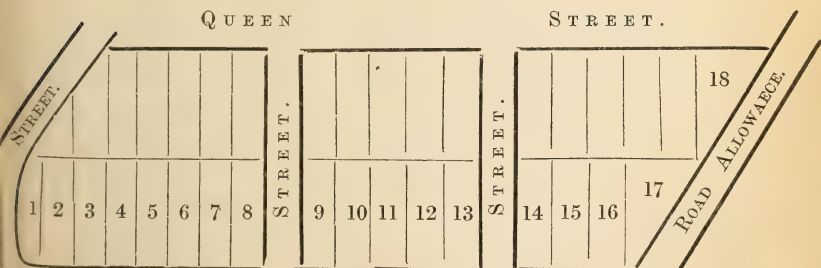
It appeared that the defendant, by deed dated 23rd October, 1867, conveyed to James P. Spier part of lot 4, in the ninth concession of Hamilton, which was described by metes and bounds, reserving thereout eight village lots, namely, one to eight inclusive, on one side of Front street, in tier one; also lots two, three, and four, north of Queen street, in said tier; and one, two, and three, south of Queen street, in tier two, and the right of a switch east of the railway, and the lands planned and claimed by the railway company, and the buildings now occupied by the said defendant.

By deed dated 10th March, 1870, James P. Spier conveyed to the plaintiffs all that part of village lot 4, in the Village of Harwood, east of the travelled road, &c., and also 66 feet of the south part of 4, south of Queen street, as laid down in the registered plan of said village by E. C. Caddy, P. L. S., forming part of lot 4, in the ninth concession of Hamilton. And by deed of confirmation, dated the 28th February, 1872, reciting that the land in the foregoing deed was incorrectly described, Spiers conveyed to the plaintiffs the same land as composed of all that part of village lot 4 on the west side of the travelled road, running parallel to the Cobourg, Peterborough, & Marmora R. W. Co., and adjoining said travelled road, and in tier two of said village, and south of the line dividing said tier into two ranges of lots, and also 66 feet off the south part of lot 4, on the south side of Queen street, in said village, and in said tier two, and north of the said dividing line.

Mr. *Caddy*, the surveyor who laid out the village, testified that he made a plan of it for registration in 1854, for

Madam Vivien and her trustee, who afterwards conveyed to defendant. On that plan the numbers of lots on the south range of tier 2 take their numbers from the numbered lots on the north range, a line dividing the north and south ranges; among the lots, as reserved in the deed from defendant to Spier, there is a lot 1 on the south side of Queen street, in tier 2, but there is no lot 1 on the plan, nor laid out on the ground; the witness would call lot 2 on the plan as the first lot on tier 2, if he was called to point out the first lot in that range on the plan; if the reservation had been 1st, 2nd, and 3rd lots of tier 2, that would have reserved the lots numbered 2, 3, and 4, as contended for by the defendant. He said that when the plaintiffs settled on their land, he, witness, pointed out lot numbered 5 as being the lot they got from Spier, and they built on it, and as far as witness knew were in possession ever since; that if called on to point out the 1st, 2nd, and 3rd lots south of Queen street, in the 2nd tier, he would not have pointed out No. 4, south of the dividing line, as one of them; that he located the plaintiff eventually on the south 66 feet of lot 4, north of the dividing line, and south of Queen street, and on the whole of lot 4, south of the dividing line, before plaintiff got his deed: that in the first instance, before he finished his village plan, he made a lot 1 on the south side of Queen street; but being a very small gore, he made it part of lot 2, making no lot numbered 1; that lots 1, 2, and 3, on tier 2, he could not tell where they would be, nor could any one else.

The following sketch will illustrate the locality:—



The plan produced from the registry office had upon it—"Town plot of Harwood, Rice Lake, &c. Scale, three chains to an inch. True copy, signed, Edward C. Caddy. Number three is not yet surveyed as laid out on the plan. Signed, E. C. C. R. Sinclair, Trustee." There was no other certificate.

He, the witness, gave the plan, with a certificate, to Mr. Sinclair, the trustee, and he thought that Mr. Sinclair had registered the wrong plan.

Mr. *Barber* was called, who acted as agent for Spier in purchasing and selling the land in question; he understood lot 4, as claimed by the plaintiffs, was part of Spier's purchase, although he could not tell the number of the lots; but he understood that lot 4, as claimed by the plaintiffs, as a portion of the land Spier had purchased from defendant, and sold to plaintiffs, and that the blacksmith's shop (referred to by the defendant) was partly on lots 3 and 4 south of the dividing line, and that he, witness, would not have purchased if he understood 4 was reserved; he expected to get possession of the blacksmith's shop, but he never got it, or asked for it; he saw the plaintiff building on his lot, and he told him he thought he was on the wrong lot; he was then building on lot 5; witness told him to go on and build, as Spier would see him right, if he was on the wrong lot, and that his house would be put on the right lot; that Spier would not know where 4 was on the ground.

On the part of the defence, *Drope*, the defendant, was examined. He said, he knew lot 4, as plaintiffs claimed it; that he had been in possession of it for seventeen years; he had a blacksmith's shop on part of it, and fence posts on the easterly side: that when he conveyed to Spier he intended reserving the three lots, of which No. 4 was one, and on which his shop was, and the two lots to the east of it, and so told Barber, who acted for Spier: that he had possession of these three lots ever since; plaintiff took possession of the lot numbered 5 as lot 4, and built on it, and is there yet; he stated that he would not deed the land by any plan, as Mr. Caddy told him the lots were wrongly numbered; he meant by his reservation of lots 1, 2, and 3

to be the same lots that are marked in the plan 2, 3, and 4; that the plaintiff, just before he bought the adjacent lot, had been a tenant under him on the very lot in dispute; that he gave him notice to quit, and he bought the next lot, and built on it; the defendant had no residence on the lot, only the blacksmith shop, which he let.

Upon this evidence the learned Judge was first of opinion that the plan from the registry office was not such a plan as was binding on the vendor, Drope, the defendant; and, besides, he did not, in his deed to Spier, refer to any plan. The plan was registered in April, 1855, and he was inclined to think, from the evidence, although the plaintiffs took possession of No. 5, or the 4th lot, as their correct lot, that they were not precluded from taking lot 4, although, as a fact, it was the third lot under their deed from Spier, because Drope did not reserve it in his deed to Spier; and the learned Judge entered a verdict for the plaintiffs, reserving leave to defendant to move to enter a verdict for him, as on the merits the defendant, he had no doubt, should succeed.

During Easter Term, 1872, *Armour*, Q. C., obtained a *rule nisi* to enter a verdict for defendant on the law and evidence, pursuant to leave, and under the provisions of the Law Reform Act.

During Michaelmas Term, 1872, *J. W. Kerr* shewed cause. The defendant should not be allowed to explain his deed; the deed should explain itself. He has done so, and has said he intended to reserve 4, and that while the deed reserves 1, 2, and 3, he intended to reserve 2, 3, and 4. The mistake is in no way that of the plaintiffs: it is that of the surveyor only. The plaintiff, whose wife owned the property, did not give evidence, the defendant did. The evidence of Barber supports the plaintiff's contention, and should prevail over that of defendant.

Armour, Q. C., supported his rule. The numbers on the north side of the tier refer to the south also. In tier 2, lot 4, south of Queen street, is the whole lot. It extends north and south of the dividing line which forms the cen-

tre of the tier. There is no reference in the deed to a plan. In law no binding plan has been registered; that which has been filed has no proper certificate. In such a case as this the lots must be ascertained on the ground. In fact, defendant had his shop on the 3rd lot on the ground (4) for 17 years. Spier took possession of all but 2, 3, and 4. Plaintiff put his blacksmith's shop on the 4th lot (*i. e.* 5). Barber's evidence is contradictory. Where parol evidence has to be resorted to, the most satisfactory is that to be gathered from the conduct of the parties when the conveyance is made. As to letting in parol evidence: *Taylor* on Ev., 6th ed., 1032, sec. 1078; *McGregor v. Calcutt*, 18 C. P. 39; *Attorney General v. Drummond*, 1 Dr. & War. 353, 367.

MORRISON, J.—The facts appearing in the case shew that the defendant was the owner of part of No. 4, in the 9th Concession of Hamilton, part of which was laid out in village lots: that the defendant sold and conveyed to one Spier, the plaintiffs' grantor, the same, reserving thereout various village lots lying contiguous to one another on both sides of different streets. Among them he reserved village lots 1, 2, and 3 on the south side of Queen street, in what is called tier 2. In fact there is no lot No. 1 on the south side of Queen street, either laid down on the plan of the village, or laid out on the ground, the first lot on the south side of Queen street being numbered 2, and being so numbered to correspond with the 2 on the opposite side of the street—there being a No. 1 on that side also—but owing to the western end of Queen street being intersected diagonally, the lot opposite to No. 1 on the south side was cut off.

The surveyor originally intended there should be a lot 1 on the south side, but finding there was not enough land to correspond with and opposite to 1 on the north side, he numbered the first lot as 2, and in this way the mistake, which is now in question, no doubt, has arisen.

It appeared, also, that when the plaintiff purchased, in 1870, from Spier, the adjoining lot (5) was pointed out to him as being 4, and that he built upon it, and has been

living on the lot ever since. The defendant, on the other hand, occupied 2, 3, and 4, on which latter lot, the one in question, the plaintiff, Kean, had a blacksmith's shop and fence posts on its eastern limit, and has, ever since the sale to Spier, over 16 years, occupied No. 4 as one of the reserved lots.

The defendant in his conveyance, reserved three village lots, without reference to any particular plan, described in the deed as 1, 2, and 3, south of Queen street, &c., and the question is, whether, as it appears that in fact there is not a village lot 1 on that side of Queen street, parol evidence can be given to shew that it is a mistake or misdescription, and that it was intended to reserve 2, 3, and 4, and that, in fact, these lots were reserved.

There is nothing ambiguous in the reservation on the face of the deed. It is only when we come to enquire where are those three lots, and what they embrace, that the evidence shews there is no village lot on that side of Queen street known as lot 1.

It is, therefore, evident that there is a misdescription or mistake in the reservation as to one of the three lots. There are other lots numbering after No. 4, on the same side, belonging to the defendant at the time he made the conveyance to Spier. If the reservation had been of three lots, without specifying their numbers, the plaintiff could have elected to take any three lots on that side of the street.

In *Beaumont v. Field*, 1 B. & Al. 247, where a deed purported to grant all the coal mines now in the occupation of K., and the grantor had no lands in K.'s occupation at the time, evidence was admitted to explain the latent ambiguity. In that case it was contended that certain letters, written several months before, offered in evidence to explain the state of the occupation at the time of the execution of the deed, and to shew what lands were meant to pass, were inadmissible; but the Court held they ought to have been received, and made a rule absolute for a new trial.

In *Rex v. Inhabitants of Wickham*, 2 A. & E. 518, parol

evidence was tendered to prove that pieces of land, described in a deed of feoffment, were, in fact, wholly situate in the parish of B., and not in the parish of S., and that the name of the latter parish, if intended to describe the situation of the lands purchased, had been inserted in the deed by mistake, instead of the parish of B. The evidence was rejected. The Court held it should have been received, and quashed the order of Sessions.

In *Hutchins v. Scott*, 2 M. & W. 809, where the lease of a house was that of No. 38, but altered by the defendant to No. 35, among other questions arising, it was contended that no parol evidence could be given to shew that No. 38 was a mistake.

Lord Abinger, C. B., in giving judgment, said, at p. 815: "Now, suppose it never to have been altered, and to stand No. 38,—the plaintiff might have shewn that the defendant had no house No. 38, or any other circumstances to prove that No. 38 was an immaterial part of the description. * * Again, if No. 35 was the house intended, I am clearly of opinion that parol evidence was receivable to shew that 38 was a mistake. If there were any suggestion that the defendant had any other house, the case might be different."

In *Whitebread v. May et al.*, 2 B. & P. 593, evidence was admitted for the purpose of shewing what land the testator intended to pass by his will. The case was tried before Lord Eldon, C. J., and a verdict for plaintiff.

On the question coming before the Court, Lord Alvanley, C. J., said, at p. 597: "There is a difference of opinion upon the Bench, * * and no conclusive judgment can be given. We have, therefore, communicated with the Lord Chancellor, before whom the cause was tried * * and his Lordship has declared himself ready to put his seal to a bill of exceptions * * to enable the parties to take the opinion of another Court. The question will be, whether the words 'the same estates at L. H. and B.' are so descriptive of locality as to preclude the admissibility of any evidence, that the testator intended to use them in any other sense?" Judgment was given *pro formâ* for the plaintiff.

See also the remarks of Mansfield, C. J., in *Doe Chichester v. Oxenden*, 3 Taunt. 147, in which he refers to *May v. Whitebread*, and in giving judgment says, in reference to the decided cases, at p. 157 : " It is not expressly said in any of these cases, that it was necessary to receive the evidence in order to give effect to the will, which would not operate without such evidence. But, although this is not said, yet the rule seems to hold. * * Here, without the evidence, the will has an effective operation ; everything will pass under it, * * and this being so, the case herein differs from all the others because in them, " the evidence was admitted to explain that which without such explanation, could have had no operation."

In *Selwood v. Mildmay*, 3 Ves. 306, the testator devised stock in the 4 per cent. annuities of the Bank of England to his wife. It was shewn by parol evidence that when he made his will he had no such stock, but that he had some, which he had sold out, and had invested the produce in long annuities.

Sir Richard Pepper Arden (Master of the Rolls) said, at p. 310 : " In this case the evidence is to prove, not that it is a mistake, for that is clear, but to show how that mistake arose ; and when one reads what the case was, it would be unjust to refuse to rectify a mistake, so clearly and naturally accounted for. * * It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea, that he had such stock. The distinction is this : if he had had the stock at the time, it would have been considered specific, and that he meant that identical stock ; and any act of his destroying that subject would be a proof of *animus revocandi* ; but if it is a denomination, not the identical *corpus* ; in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified."

This case was followed in *Penticost v. Ley*, 2 Jac. & Walk. 207. See, also, *Gallini v. Noble*, 3 Mer. 691.

In *Miller v. Travers, et al.*, 8 Bing. 244, Tindal, C. J., reviews a great number of the cases. Among others he

refers to *Selwood v. Mildmay* at length, and he says, at p. 252: "This case is certainly a very strong one; but the decision appears to us to range itself under the head, that *falsa demonstratio non nocet*, where enough appears upon the will itself to shew the intention after the false description is rejected."

He also referred to *Day v. Trig*, 1 P. Wms. 286, where the devise was "of all testator's freehold houses in Aldersgate street," when, in fact, he had no freehold, but had leasehold houses there. The devise was held to be a devise of his houses there; and that as there were no freehold houses to satisfy the description, the word "freehold" should rather be rejected than the devise be totally void.

Tindal, C. J., in referring to this case and *Selwood v. Mildmay*, also says, at p. 253: "They decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that anything may be added to the will."

In *Richardson v. Watson*, 1 N. & M. 567, A., having had two separate closes in Dale in the occupation of B., devises to C. the close in Dale in the occupation of B. C. claimed both closes by shewing that A. supposed that the property occupied by B. consisted of one close. There evidence was allowed to explain the will.

Lord Denman, C. J., says, at p. 573: "It appears to me that the ambiguity in the will is clearly a latent ambiguity capable of being explained by parol evidence. Evidence has been produced, but I think that evidence does not at all explain what the testator meant, whether he intended the one or the other of the closes to pass by his will, and to be enjoyed by the devisee. The devise, therefore, is void, and the plaintiff, as heir-at-law, must recover."

And Littledale, J., at p. 574, referred to 5 Co. Rep. 68, *Cheyney's* case, where it is said: "If a man has two sons, both baptized by the name of John, and conceiving that the elder (who had long been absent) is dead, devises his land, by will, in writing, to his son John generally, and in truth the elder is living, in this case the younger son

may, in pleading or in evidence, allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent; that he thought the other to be dead."

In *Smith v. Doe dem. Jersey*, a case in the House of Lords, 2 B. & B. 493, at page 550, Bayley, J., says: "This is the first time I have ever known it doubted whether the estate, and interest, and powers of the settlor over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant; I am not construing a legal instrument by the acts of the parties, or by their understanding upon it (as in *Cooke v. Booth*, Cowp. 819); but by shewing the circumstances and situation of the party, and the estate and interest she had at the time, I am enabling the House to judge what, in legal construction, was her meaning."

And again, at p. 551: "If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will; and does not the construction vary in some cases according to the estate?"

In *Doe v. Huthwaite*, 3 B. & Al. 632, Abbott, C. J., in granting a *venire de novo*, stated, at p. 642: "that the Court had considered the case, and were of opinion that evidence of the state of the testator's family, and other circumstances, was admissible, and that upon such evidence being given, the jury might find whether he had made a mistake in the name of the devisee or not. If no such evidence were given at the trial, it would then be a mere question of law as to the intention of the testator, to be collected only from the will itself."

In *Paddock v. Fradley*, 1 C. & J. 90, Vaughan, B., in giving judgment said, at p. 95: "It is said, that he (a witness) is not competent to vary the terms of a written agreement. The terms of the agreement are, 'All those brick works now in the possession,' &c. It is said there is no ambiguity in this agreement; that there is nothing to be explained; but that the premises must be confined to what was in the possession of the plaintiff at the time of the agreement; and there-

fore no evidence was admissible to extend the premises beyond what was then in his possession."

And after referring to *Goodtitle dem. Radford v. Southern*, 1 M. & S. 299, Vaughan, B., proceeds: "This case, therefore, shews that parol evidence is admissible to explain such an ambiguity as the present. In the present case it being ambiguous of what the brick works consisted, it was competent for the defendants to give parol evidence to explain what those were which were intended to be comprised."

In *Murly v. McDermott*, 8 A. & E. 138, Lord Denman, C.J., in giving judgment says, at p. 143: "The evidence said to have been improperly received was a handbill, advertising the properties both of plaintiff and defendant for sale; and it was urged that this was received in order to construe the deed by which the plaintiff's property was conveyed to him. The plaintiff and defendant had purchased of the same owner. The lot which each purchased was described in his deed by a reference to the occupation of the then tenant, and there were words to pass all that was known or reputed parcel of such occupation. There was evidence to shew that the handbill in question was circulated in the sale-room before and at the time of the sale, and that it was seen by the person who attended as the plaintiff's agent and bid and bought for him. Looking then at these facts, and the language of the deed, we think this handbill properly received, not to control the language of the deed, or to construe it, but to apply it. It was evidence to shew what it was that at the time of the sale was known or reputed to be parcel of that tenant's occupation which the plaintiff purchased, and which was conveyed to him by the deed."

In *Burgess v. Denison*, 16 U. C. R. 457,—where the difficulty in the description of the premises arose upon the words, "To be bounded on the east by the garden fence of my old cottage," which words would have been sufficiently explicit if the garden fence had continued north far enough, and as any stranger, knowing nothing of the ground and looking only at the lease, would expect it did,—

Sir John Robinson said, at p. 462: "Now, when we learn from the evidence that the garden fence did not so extend, a latent ambiguity is for the first time disclosed by this extrinsic evidence, and we may therefore and must resort to extrinsic evidence, to ascertain what was intended; and when the evidence is attended to, it is very plain what was meant to be leased from what was proved at the trial respecting the survey made for the purpose of fixing the rent, and to which the plaintiff was privy, and respecting the conduct of the plaintiff after he took possession."

The latest case I can find bearing on the subject is that of *Grant v. Grant*, L. R. 5 C. P. 380, which was an appeal against a judgment of Lord Penzance, which was upheld.

Bovill, C. J., in giving judgment said, at p. 384: "The determination of the question really depends upon the admissibility of and the effect to be given to the parol evidence; and this evidence is of two kinds, one class of evidence being offered for the purpose of shewing that there is in the will a latent ambiguity, and the other class for the purpose of explaining it and removing it. The devise of the testator was to 'my nephew, Joseph Grant,' and the point at issue is, whether these words apply to the plaintiff or defendant. The language of the will itself is clear, and free from ambiguity on the face of it; but, as in most cases of wills, parol evidence is necessary, and therefore admissible, to identify the party intended to be described, just in the same way as such evidence is admissible to identify and to shew what was the subject-matter devised."

The learned Chief Baron refers to many cases bearing on the subject, among others, at p. 389, to a case referred to by Lord Hardwicke: "As where the testator described a legatee by a wrong name, which she never bore, parol evidence was allowed by the Master of the Rolls to shew that the testator knew such a person and used to call her by a nickname." At the conclusion of the judgment the Chief Baron says, at p. 390: "Under these circumstances, the parol evidence being admissible for the purposes and in the manner

which we have pointed out, we think it exposed a latent ambiguity, and equally removed it, and enables us to understand the language of the will, and to apply it as the testator is clearly shewn to have intended."

Lyle v. Richards, L. R. 1 H. L. 222, was a case where there was a misconception or inaccurate statement of a boundary line between mines, but which did not appear on the face of the deed, and the Lords held that parcel or no parcel is a question of fact for the jury, but that the Judge was bound to tell the jury what was the proper construction of any documents necessary to be considered in the decision of that question.

Lord Westbury, in his judgment, said, at p. 239: "In my opinion the evidence was clearly admissible. Upon a question of parcel parol evidence is always received. The error here is latent, not being discovered until it is shewn by extrinsic evidence what was the true site of the house incorrectly laid down in the map; and in a question of the extent or correctness of the parcels in a deed (which are a description of external objects), parol evidence, for the purpose of ascertaining the thing so described or referred to, is admissible."

It seems to me that the fair inference to be drawn from all these various authorities is, that where a latent ambiguity, as here, presents itself by the extrinsic evidence, which discloses that there was a mistake in describing one of the village lots reserved, that parol evidence may be also received to explain the mistake and the misdescription, and shew what village lots were reserved, such as the state, occupation, and condition of the land at the time the deed was executed, that one of the village lots was misdescribed, not by calling it or describing it by a description applicable to another village lot, but by a number or designation which the parties applied to it by mistake or otherwise, for the purpose of giving effect to the reservation and the intention of the parties.

I refer to evidence not to contradict the deed, but to give effect to the reservation of three village lots on the south side of Queen Street.

This is not a case where the deed could have a certain operation by its language or terms, as to reserve a village lot existing, answering the name or description.

It is quite clear that three village lots were reserved on the south side of the street. If there were, in fact, say lots 1, 2, 3, and 4, and the reservation was of lots 2, 3, and 4, instead of 1, 2, and 3, as intended by the parties, in such a case parol evidence could not be received to shew the mistake, or rather to shew something which would be contrary to the deed itself, there being, in that case, no ambiguity, latent or patent, if the deed had reserved only one village lot on the south side of Queen street, describing it as No. 1, the parol evidence in this case shews that we would be warranted in construing the reservation to be that of the first lot on that side of the street, just as if the deed used the words first lot instead of No. 1.

And so here—where the defendant by his deed reserved the three lots, of which the lot in question is one, designating 1, 2, and 3, being the numbers or description by which the parties knew them and described them at the time of the execution of the deed, the defendant also retaining possession of the lots so reserved, and keeping possession of them by those numbers for sixteen years—we may properly construe the reservation to be of the three lots now called 2, 3, and 4, without breaking in upon any general principle of law.

I have considered the case and the evidence with a view of doing justice between the parties without violating any rule of law, and although I am not perfectly satisfied with the conclusion I have arrived at, I think the preponderance of authority, and the leaning of the cases, is in favor of the defendant.

WILSON, J., concurred.

RICHARDS, C. J., stated that while he did not entertain so strong a view as his learned brothers, he did not dissent.

Rule absolute.

On the 5th of September, 1874, the following rule was read and promulgated in open Court :—

“IN THE COURT OF QUEEN'S BENCH, AND THE COURT OF
COMMON PLEAS.

Regulæ Generales.

TRINITY TERM, 38TH VICTORIÆ.

Saturday, the fifth day of September, A.D., 1874.

IT IS ORDERED,—That the following Rules shall come and be in force in the Courts of Queen's Bench and Common Pleas, from and after the last day of this present Trinity Term :—

1. As the business to be transacted out of Term does not appear to require more than one Judge of the Courts of Common Law to sit in open Court every week,—It is ordered, that one of the Judges of the Superior Courts of Common Law shall sit in open Court in Osgoode Hall, out of Term, pursuant to the Administration of Justice Act of 1874, every week, for the purpose of disposing of all Court business which may be transacted by a single Judge, and such sittings shall be on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

2. All Rules, directed to be issued out of Term, shall be four day Rules, and shall be heard at the first sitting of the Judge in open Court for arguments after the same are returnable, unless otherwise ordered.

3. Demurrers shall be set down at least four days before the day on which they are to be heard, and notice given to the opposite party.

4. A Demurrer Book shall be left with the Clerk of the Crown and Pleas, of the Court in which the cause is pending, at the time of setting down the demurrer.

(Signed) WM. B. RICHARDS, C.J.
“ JOHN H. HAGARTY, C.J.C.P.
“ JOS. C. MORRISON, J.
“ ADAM WILSON, J.
“ JOHN W. GWYNNE, J.
“ THOMAS GALT, J.

During this term the following gentlemen were called to the Bar:—

ANGUS M. MACDONALD, FREDERICK ST. JOHN, JOHN ROSS, DONALD GREENFIELD MACDONELL, DAVID HILL WATT, JAMES PARKES, THOMAS B. BROWNING, JOHN RICE McLaurin, JOHN WRIGHT.

SITTINGS IN VACATION

AFTER TRINITY TERM.

REGINA V. CROUCH.

Conviction—Appeal to Sessions—Proof of recognizance—Waiver.

Defendant applied to quash an order of the General Sessions quashing a conviction, made on appeal, on the ground that it was not shewn at the Court that defendant had entered into the necessary recognizance. It was not denied that notice of appeal had been duly given or that the recognizance had been duly entered into and filed with the Clerk of the Peace; but the objection was that it had not been proved at the trial of the appeal.

Held, under the circumstances of the case, set out below, that the respondent's counsel, by his conduct, must be assumed to have waived any objection to the recognizance.

On the 9th of October, 1874, *Brough* obtained from Richards, C. J., sitting alone under the Administration of Justice Act, a rule *nisi* to quash an order of the General Sessions of the County of Lambton made on appeal in June last, quashing the conviction of defendant, on the ground that it was not shewn at the said Court that the defendant had remained in custody until the holding of the Court, or that he had entered into a recognizance, &c., conditioned to appear at the said Court and try the appeal, and to pay such costs as should be awarded; and because the Court had no jurisdiction to hear the appeal; and on grounds disclosed in affidavits and papers filed.

The question raised was, whether the defendant was in a position to have his appeal heard at the General Sessions. The proper notice of appeal had been given and the recognizance entered into. At the proceedings before the Sessions the signature and service of the notice were admitted.

The learned Chairman of the Sessions entered on his
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notes: "Mr. Bucke objects, after the jury were sworn, but before the case was entered on, that the recognizance was not produced or proved."

The original notice of appeal was annexed to the affidavit of the attorney for the respondent, who was the prosecutor in the case. It was dated the 18th of March. The matter came on to be heard at the proper Sessions of the Peace held in the month of June.

The attorney of the appellant in his affidavit stated, that before entering on the case he objected that it was not proved that the necessary recognizance had been entered into: that the Chairman overruled the objection: that he caused the same to be taken down by the Chairman: that in deference to the ruling, and subject to his said objection, he proceeded with the case; and that the conviction was quashed.

Mr. *Lister*, the attorney for the defendant, also filed an affidavit. It shewed that the conviction was made on the 18th of March, and a notice of appeal served on that or the next day, and the recognizance, with two sufficient sureties, was entered into before a Justice of the Peace, conditioned for the defendant's appearance at the Sessions to try the appeal &c., which recognizance was, on the 19th of March, filed with the Clerk of the Peace for the said county of Lambton, and the same remained in the custody of the Clerk of the Peace until long after the sittings of the Sessions in the month of June: that on the matter coming on to be heard before the Sessions, and before the jury was called, the notice of appeal was put in, and the due service thereof admitted by Mr. *Bucke*, the counsel for the prosecutor, and no objection made that the recognizance had not been proved: that thereupon a jury was called and sworn to try the matter of the appeal, whereupon Mr. Bucke objected that the recognizance had not been proved: that the learned Chairman of the Sessions intimated to Mr. Bucke that the objection should have been taken before the jury was sworn, but that he would note the objection: that he, Mr. *Lister*, at the same time told Mr. Bucke that the recognizance was filed

with the Clerk of the Peace, (who was then in Court) and that it was in his possession, and that if he wanted it it could be procured : that he, Lister, turned round to the Clerk of the Peace and spoke to him about producing it, but as he is a little deaf he in all probability did not understand him (Lister), and as Mr. Bucke did not urge his objection, nor insist on the production of the recognizance, the question seemed to drop by mutual consent, and the case was proceeded with ; that the case was tried on its merits and a verdict of not guilty rendered.

The defendant also filed a certificate of the learned Chairman of the Quarter Sessions, stating that on the trial, after proving the notice of appeal, and after the jury were sworn, Mr. Bucke, the county attorney, acting for the respondent, objected that the recognizance had not been proved : that he, the Chairman, intimated that the objection ought to have been made before the jury was sworn : that Mr. Lister, acting for the appellant, then stated that the recognizance had been entered into and was in the possession of the Clerk of the Peace, and requested the Clerk to produce it : that the objection did not appear to be further urged, and the case went on and was tried on its merits.

A further affidavit was filed, made by Mr. Bucke, in answer, in which he stated, that on the appeal coming on to be heard, the defendant's counsel, Lister, produced the notice of appeal, and he, Bucke, admitted the service thereof : that Lister then requested that the appeal should be tried by a jury : that while the jury were being called and sworn he asked Lister to produce the recognizance, intending then to examine the same, and if it was not sufficient to take any objection thereto that he might see fit : that Lister then told him that the recognizance was filed, and if he wanted it he might get it himself : that when the jury was sworn the Chairman requested him to proceed with his case : that he then rose and took the objection mentioned in his former affidavit, and the Chairman intimating the objection should have been taken before the jury were sworn, he requested the Chairman to note the same, *and in deference to his ruling,*

but subject to the said objection, he proceeded to address the jury and continued the case: That the said Lister did not in his hearing, or to his knowledge, say to him that if he wanted the recognizance it could be procured, and the said Lister did not to his knowledge, or in his hearing, request the Clerk of the Peace to produce the recognizance: that the Clerk of the Peace is somewhat deaf, but not so much so that he cannot be made to hear by slightly raising the voice, and, as a matter of fact, is always made to hear when papers in his custody are actually required by counsel at the Court of General Sessions of the Peace; and the said Lister, if he required the said Clerk of the Peace to produce the said recognizance, could easily have made himself understood by the said Clerk; that he urged the said objection as thereinbefore stated, and as stated in his former affidavits, and that he did not in any way abandon the same, or allow the matter to drop by consent, and that the said objection was not dropped by mutual consent.

The prosecutor also filed a certificate from the Clerk of the Peace, to the effect that the recognizance of the appellant and his sureties was not demanded to be produced by him, by the said defendant, nor any one on his behalf, at the hearing of the appeal.

The learned Chairman of the General Sessions under the writ of *certiorari* returned the conviction, which appeared to have been made on the 18th of March, 1874.

It was endorsed on the back: "No. 8623. Filed 19th of March, 1874. The Queen v. William Crouch. Conviction. Verdict, not guilty. Charles Robinson, Chairman, Q. S."

The information and complaint was also returned, but that was not endorsed.

Then the recognizance, which appeared to have been enrolled, was endorsed, on another part of the same sheet of paper: "No. 8624. Filed 19th March, 1874. *Re* Wm. Crouch. Recognizance to prosecute appeal."

On the 4th of November, before Richards, C. J., sitting alone under the Administration of Justice Act, the matter was argued.

Osler shewed cause. 33 Vic. ch. 7, sec. 13, O., no doubt makes the production and proof of the recognizance conditions precedent to the entertaining of the appeal: *Dickenson's* Quarter Sessions, 6th ed., 639; *Paley* on Convictions, 5th ed., 371; but the parties may so act as to render it unnecessary. It must either be produced and proved or admitted, and here the evidence shews it was admitted, and its production was waived. The case of *Re Meyers and Wonnacott*, 23 U. C. R. 611, does not apply, for there the recognizance was not filed.

Brough contra. The case of *Re Meyers*, 23 U. C. R. 611, must govern the decision in this case. See also *Kent v. Olds*, 7 U. C. L. J. 21. The language of the judgments in these cases shew that the recognizance must be produced and proved.

[In answer to a question of the learned Judge as to whether the recognizance was in fact in Court at the trial, the prosecution filed a certificate from the Clerk of the Peace, dated the 4th of November, 1874, in which he stated that he did not remember that the recognizance referred to was, during the hearing of the appeal, in the Court room when the appeal was heard. He further stated that the production of the recognizance was not called for by the appellant or any one on his behalf; and the defendant also filed a certificate of the Clerk of the Peace, dated the same 4th of November, in which he stated that the recognizance to prosecute the appeal was duly filed with him in his office on the 19th day of March last: that his office is in the Court house: that he did not then remember whether he had the said recognizance in Court on the said trial, but his practice has been to have the convictions and recognizances in Court during the Sessions; if the recognizance was not in Court, and its production had been called for, he could have almost instantly produced it.]

RICHARDS, C. J.—The practice in relation to appeals is thus laid down in *Dickenson's* Guide to the Quarter Sessions, 6th ed., 639.—“The notice of appeal, as well as the entry

into recognizance, if required by Statute as conditions precedent to the right of appeal, must next be proved or admitted, whether it is intended to try or only to move to respite the hearing ; for, till it is made to appear to the Court that the appeal is *duly lodged* at the proper Sessions, as well as that due notice has been given, and recognizance entered into where so required by the Act applicable to the appeal, then jurisdiction to hear or adjourn it will not attach. * * A respondent may so waive proof of appeal, or admit it so as to make proof unnecessary."

In *Rex v. The Justices of Hertfordshire*, 4 B. & Ad. 561, notice of appeal against a poor rate was given in due time for October Sessions, and the appellant attended them ready to try and prove the notice. The respondent's counsel prayed a respite, on the ground they had not had time to prepare their defence to the grounds of appeal stated in the notice, amounting to fifteen in number. The appellant opposed the respite ; it was granted on payment of costs. Notice of appeal was not proved, nor admission of it required. One of the notices was handed by respondents to the Clerk of the Peace, and was thereupon filed with the records of the Sessions. At the next Sessions the appeal was called on, respondents' counsel objected to its being heard without proof of the original notice, which the appellant was not then prepared to give. The Sessions then confirmed the rate without costs.

On a rule *nisi* to compel the Justices to enter continuances and hear the appeal, the Court held that the respondents had acted on the notice so as to make further proofs unnecessary, and made the rule absolute.

The case of *Re Meyers and Wonnacott*, 23 U. C. R. 611, shews that though a mere technical objection might be waived by adjourning a proceeding over, yet when the objection is a matter of substance, it cannot be waived.

The rule that omitting to raise the question of jurisdiction in an inferior Court does not prevent the party from applying for prohibition, would seem to be somewhat analogous to this proceeding on appeal, the right to which is a crea-

tion of the statute, and a compliance with the conditions imposed by the Statute before the appeal can be heard seems necessary to be shewn before the appellant can proceed in the Court appealed to.

If, as a matter of fact, the notice of appeal had not been given in time, or the recognizance entered into, or other matter required to be done before the appellant could proceed with his appeal, the objection could probably be taken at any time, for it would shew that the Court had no *jurisdiction* to try the appeal.

But here it is not contended that the notice was not given. It is admitted it was. Nor is it argued that the recognizance was not entered into, for it was filed, long before the day of trial, in the office of the Clerk of the Peace. So that any waiver that is urged is not as to the substance, but as to the formal proof.

The service of the notice was admitted, but the original notice is not returned to us amongst the papers as filed in the cause. It was probably used at the trial, and there is a notice of appeal appended to the papers filed by the respondent on this application clearly shewing that one was given.

I apprehend it will not be now seriously contended by any one that the proceedings in appeal should be set aside because the notice of appeal *was not filed* before the proceedings were commenced in the General Sessions.

Supposing, when the respondent's counsel raised the question as to the recognizance the roll had been handed to him by the Clerk of the Peace, and he had examined it, and left it on his table, and pursued the objection no further, would it then be considered that it was open to him to say that because the appellant had not put it in and refiled it with the Clerk of the Peace on these proceedings in appeal, that they were wholly void? It would, I should think, be held that it was admitted that the recognizance had been entered into, and ceasing to object I should suppose might well be considered an admission.

If the respondent's counsel had stated, when the learned

Chairman intimated his opinion that the objection to the want of proof as to the recognizance was taken too late, though he yielded to his ruling, that he intended to persist in his objection, and gave it to be understood that he still contended it was, in fact, a necessary part of the appellant's case to produce and put in the recognizance, then I think, if the case went on against such clear notice that the objection was persisted in, it would be open to respondent to pursue the objection now.

The affidavit says: "And the Chairman intimating to me that the said objection should have been taken before the jury were sworn, I requested him to note the same, *and in deference to his ruling, but subject to the said objection, I proceeded to address the jury, and continued the case.*"

I do not understand that the import of these last words were stated to the Court, but that such was his, the respondent's counsel's, understanding of what he was doing.

If he had stated this in words no one could have been misled, and the document could have been at once produced. By his omitting to state it it is probable it was assumed he was satisfied with the statement that the recognizance was with the Clerk of the Peace.

The certificate of that officer shews he was in the habit of producing all the papers on the trial of the appeal. It is probable all the papers were together in the Court on the trial. The record of conviction undoubtedly was produced, for the verdict of the jury is endorsed on it. The recognizance roll appears to have been filed on the same day as the conviction was filed and the very next paper to it, for the conviction bears the number 8623, and the recognizance 8624.

The learned Chairman of the Quarter Sessions in his certificate states, that when he intimated that the objection ought to have been made before the jury was sworn, Mr. Lister, for the appellant, stated that the recognizance had been entered into, and was in possession of the Clerk of the Peace, and requested the Clerk to produce it.

The objection did not appear to be further urged, and the case went on and was tried on the merits.

The practice on trials at Nisi Prius seems now well established, that when grounds are taken at the end of a plaintiff's case for a nonsuit they are not available unless renewed at the termination of the cause, as objections to the Judge's charge. The point is not of course exactly analogous, but that practice avoids mistakes and confusion, and gives fair notice to all parties that an objection is persisted in.

Here if that course had been pursued no difficulty could have arisen. The learned Chairman would probably have stated the fact on his notes if the appellant abided by the ruling of the Court, and deliberately resolved not to produce the recognizance; or the recognizance would have been produced, and then there would have been an end of the objection.

Looking at the circumstances of this case, I think I must assume that the respondent's counsel by his conduct gave the Court to understand that he admitted that the necessary recognizance had been entered into, and that as far as the objection to the recognizance was concerned he no longer pressed it.

I think, therefore, that the rule in this case must be discharged, but as there seems to have been a misunderstanding as to what took place at the trial, and if the appellant's counsel had taken the trouble to have re-filed the recognizance at the trial all the difficulty would have been avoided, I think the rule should be discharged without costs.

Of course if there had really been no notice of appeal, or no recognizance, the mere omission of counsel as to taking the objection formally, or being induced to suppose that there was a recognizance when there really had been none would create a different state of facts and require a different ruling.

Rule discharged without costs.

REGINA V. PATON.

License to sell liquors—Issue of before inspector's certificate—32 Vic. ch. 32, O.

The 32 Vic. ch. 32, as amended by 33 Vic. ch. 28, O., (now repealed by 37 Vic. ch. 32, O.), enacted that no certificate for a license should be granted to any applicant until the inspector should have reported that the proper accommodation, &c., and any member of a municipal corporation who should, contrary to the Act, cause a certificate to be issued, was subject, on conviction thereof, to be fined. B. applied for a license, at a meeting of the Council, on the 28th February, but the inspector reported that his premises were insufficient, the defect being the want of a step in the stairs. A minute was entered that the license should be granted as soon as he produced the inspector's certificate, and defendant, the reeve, signed a certificate and gave it to the clerk, instructing him not to hand it over until he had received the inspector's certificate; this was received on the 2nd of March, and the certificate then given to B.

Held, that there had been no breach of the statute, and a conviction of defendant was quashed.

IN Trinity term *Osler* obtained from Wilson, J., sitting alone, under the Administration of Justice Act, a rule *nisi* calling on George Moberly, Esq., a Justice of the Peace for the County of Simcoe, and Jane Fleming to shew cause why the conviction of the defendant, dated the 15th April, 1874, made by the said George Moberly, on the information of the said Jane Fleming, should not be quashed, with costs to be paid by the said Jane Fleming, on the grounds:—

1. That the conviction is for an offence not stated in the information.

2. That the information charges the defendant with having signed a certificate for the license therein mentioned, whilst the conviction is for signing, sealing, granting, and issuing the said license.

3. That there is no offence stated in the said information or conviction, and it is not alleged in the conviction or the formation that the defendant issued a certificate for a license to any applicant therefor.

4. That there is no evidence to support the said conviction.

The conviction was brought up by *certiorari*, and filed before the issuing of the rule. It was dated on the 15th April, 1874, and recited that Robert Paton was convicted: "For that he, the said Robert Paton, at the township of Sunnidale, in the said County of Simcoe, being Reeve of the said township, did, as a member of the said municipal corporation, or council of the township of Sunnidale aforesaid, to wit, as Reeve of the said township, on the 28th February, illegally and unlawfully and contrary to the Statute, sign, seal, grant, and issue a certificate for a license to sell spirituous, fermented, or other manufactured liquors by retail in a tavern known as the Bailey Hotel, in the Village of Brentwood, in favor of George Bailey, an applicant therefor to the Council of the said township, within which the said tavern was situate; and the said license was to have effect without the Inspector of Licenses for the said township having first reported that he the said George Bailey was a fit and proper person to have a license, and had all the accommodation required by law, and when in fact the said Inspector had reported to the contrary"; and the defendant was adjudged to pay a fine of \$40 and \$20.25 costs.

The facts seemed to be, that, at a meeting of the Council of the Township of Sunnidale, held on the 28th February, 1874, George Bailey and the prosecutrix, Fleming, each applied for the necessary certificate to obtain a license to sell spirituous liquors, to be drunk on their respective premises.

The Inspector of Licenses had reported that Mrs. Fleming had complied with the requirements of the law, &c., and was entitled to a certificate for a tavern license. He also certified that Bailey had not complied with the law.

The deficiency in Bailey's premises was in the stairs. The stairs wanted another step. Both Bailey and Mrs. Fleming had had licenses the previous year. There was a minute entered in the Council Book as follows: "License to be granted to Bailey so soon as he shall produce the Inspector's certificate."

The Clerk of the Council stated that, at the meeting of the

Council it was understood that the Inspector was to go back to Bailey's. No certificate was granted to Mrs. Fleming. The certificate was handed to the Treasurer of the municipality on the 28th February, on which day it was dated. The instructions were to give the certificate to the person entitled to it. Mr. Bailey came for it, and he gave it to him on the 2nd March.

He, the Treasurer, said he received no instructions from the Clerk when he handed it to him not to deliver it to Bailey or any one else until he received the Inspector's certificate. He said he received the Inspector's certificate that Bailey had the necessary qualifications, and was entitled to the certificate, on the 2nd March. He also received the necessary bonds on the same day, and handed over the certificate. He said he was not to hand over the certificate until the bonds were executed. If they had been executed on the 28th, he would have handed the certificate over.

Mr. *Hislop*, the Clerk, said the certificate was signed by the defendant on an understanding between them that it was not to be handed over to Bailey until the certificate of the Inspector was produced; that at the meeting of the Council it was understood that the Inspector was to go back to Bailey's.

The Inspector said he had inspected Bailey's premises on the 28th of February. There was a deficiency, and he reported the fact to the Council on the following Monday. On the 2nd of March he again inspected the premises and found them all correct. The deficiency was in the stairs—it wanted another step. He had all the accommodation required by law. His certificate was given to Mr. Bailey on the 2nd of March.

The matter was argued on the 9th of October before Richards, C. J., sitting alone under the Administration of Justice Act.

McCarthy, Q. C., shewed cause. [As the objection to the variance between the information and conviction was given up, the argument on that point is not referred to.] Under

32 Vic. ch. 32, O., as amended by 33 Vic. ch. 28, O., the Council cannot direct the certificate to be granted under sec. 12 as amended, until the Inspector has reported that the applicant has complied with the requirements of the law. In fact the Inspector's certificate must precede the action either of the Municipal Council or the Reeve, and if anything be done to grant the license without that certificate first having been obtained, then the party doing this act, whether voting for, issuing, or causing or procuring to be issued a certificate for the license, is liable to the penalty under secs. 13 and 16 of 32 Vic. ch. 32, O. The Reeve signed the certificate on the 28th of February, and the instructions to the Treasurer were to give it to the person entitled to it. What the defendant did was done before the certificate of the Inspector was produced. He did nothing after the 28th of February, and if the certificate was *issued* at all it was issued before the defendant was authorized to issue it.

Osler, contra. The evidence shews that the certificate for the license was not, in fact, issued until after the Inspector's second report had been produced. It does not appear from sec. 12 that the Council are to pass any express resolution or to have the report before them. They cannot alter the Inspector's report. All they can say is, if the Inspector reports favorably the applicant is to have a license. Sec. 14 shews that the reeve and clerk are to issue the certificate. The severe penalty imposed by sec. 16 of forfeiture of office and disqualification to hold any municipal office for two years, calls for a strict construction of the statute, and clear evidence of its violation.

RICHARDS, C. J.—Section 12 of 32 Vic. ch. 32 O., as amended, provides that “*No certificate* for a license to sell spirituous * * liquors by wholesale or retail in any tavern * * *shall be granted* to any applicant except upon petition by the applicant to the Council of the township * * and to the Commissioners of Police in cities * * * in which the license is to have effect, praying for the same ; *nor until the Inspector* * * *shall have reported* that the applicant

is a fit and proper person to have a license, and has all the accommodation required by law."

Sec. 13 enacts that "*Any member of a Municipal Corporation, or officer or other person who shall, contrary to the provisions of this Act, vote for, or issue, or cause or procure to be issued a certificate for a tavern or shop license, shall, upon conviction thereof,*" pay a fine, &c.

Sec. 14, as amended by 33 Vic. ch. 28, sec. 5, O., states: "*It shall be the duty of * * the Reeve and Clerk in townships and incorporated villages, respectively, upon application of any person requiring a license, or transfer thereof, if it shall appear that such applicant has complied with the requirements of the law * * * and is therefore entitled thereto, to grant such applicant a certificate under his or their hand stating that he is entitled to a license for a certain time and for a certain tavern * * to be mentioned in such certificate; and the said applicant shall forthwith take the said certificate to the issuer of licenses, and, on presentation thereof to the said issuer of licenses, and payment to him of the provincial duty thereon, the said issuer of licenses shall issue to such applicant a license.*"

Sec. 12 provides: 1. That no certificate for a license *shall be granted to any applicant except on petition* by the applicant to the Council of the township *praying for the same*. 2. Nor until the Inspector shall have reported that the applicant is a fit and proper person to have a license, and has all the accommodation required by law.

The Council have no discretion as to granting the certificate to any person unless the Inspector makes the necessary report in his favor. They cannot modify or vary the report. The Inspector is the person who is to make this report, and his report seems conclusive.

I do not see that the law is violated by the Council directing that the certificate shall be granted *when* the Inspector makes his report in the applicant's favor. It is not to be granted *until* the report is made; but there seems no absolute necessity for the Council to meet and declare that the Inspector has made the report, and then order the certificate

to be granted. I see no reason why it may not be directed to be granted when the Inspector has made his report.

In the particular case before us, the Inspector having stated that the only defect in Bailey's qualification as an innkeeper was that the stairs at this house wanted *another step*, it certainly would not occur to even very subtle minds that there would be any violation of the law in requesting the Inspector to go and see if the *wanting step* had been supplied, and if it had been, and he gave the proper certificate to that effect, that Bailey should then receive the necessary certificate to obtain his license ; or, in other words, that the certificate should be granted to him *when* the Inspector made the proper report.

The proper report was made, and then the certificate was delivered to Bailey.

It is now contended that he issued a certificate to Bailey, contrary to law, on the 28th February, because he signed it on that day, and delivered it to the clerk of the municipality, and, as the clerk said, with the understanding that it was not to be handed over to Bailey until the certificate of the Inspector was produced.

I suppose it will not be argued, if he had signed and sealed it, and kept it in his own custody until Bailey produced the report of the Inspector, and then delivered it to him, that he had issued it until he had actually delivered it to Bailey.

I fail to see how it can be held that the entrusting it to another to deliver on the same terms, when in fact it was so delivered, can make any difference.

If it had been improperly delivered to Bailey before the report had been produced, and the license had been granted, it might, perhaps, be considered that, inasmuch as the defendant had placed it in the power of another to issue the document, and as that person had issued it before the proper time, therefore he was responsible. But here the proper report was produced, and the certificate not delivered until it was so produced.

The Act seems to contemplate that the certificate is to be delivered to the applicant, for, by sec. 14, the applicant is

to take "forthwith the certificate to the issuer of licenses."

I do not think, therefore, the signing and delivering of the certificate by the defendant to the town clerk, not to be handed over to Bailey until the Inspector's report was obtained,—and it not having in fact been handed over to or been in a position to be available by that person to procure a license until after such report was obtained, can be considered as issuing, or causing or procuring to be issued, the certificate contrary to the statute.

The conviction, therefore, must be quashed. Rule absolute to quash conviction, but there will be no costs.

I may mention that the new statute passed last session is much more explicit than the repealed one on some points, and therefore an improvement on it.

I do not intend, by the foregoing judgment, to express any opinion as to the effect of the new statute; and, as a matter of practice, I think it would always be better to have the proper report of the Inspector before the Municipal Council when they decide to grant the prayer of the petition of any applicant. In that case there would be no ground for contending, that when the certificate was issued contrary to the intention of the Council, that the persons who authorized its issue conditionally were not liable for its improper issue, for such a case could not arise.

Rule absolute.

RE McCULLOCH AND THE JUDGE OF THE COUNTY COURT
OF THE UNITED COUNTIES OF LEEDS AND GRENVILLE.

Voters' List—32 Vic. ch. 21, O.—Change of occupation before final revision.

C. was in possession of property when the assessors went round to assess; but he left, and M. took possession before the assessment slip was delivered. Immediately on receiving it, M. went and asked the assessor to change the assessment, as C. had gone to live elsewhere; but the assessor refused. M. then appealed to the Court of Revision, which refused to interfere, and afterwards to the County Judge, by whom the complaint was dismissed on a technical objection taken to the form of the complaint. On application for a mandamus to the Judge to enquire and determine whether M.'s name was not improperly omitted from the Electors' Roll :

Held, that such objection should not prevail; and the mandamus was ordered.

Held, also, that under the circumstances M.'s name should be entered on the list.

ON the 6th of November, 1874, *J. B. Read* obtained from Richards, C. J., sitting alone under the Administration of Justice Act, a rule *nisi* for a mandamus calling on the learned County Judge to shew cause why a writ of mandamus should not issue to him as such Judge as aforesaid, to enquire into and decide whether or not Alexander McCulloch was improperly omitted from the electors' roll for the town of Prescott in the County of Grenville for the year 1874, and whether or not the name of James Cosgrove should not be struck off the said roll, and the name of the said Alexander McCulloch substituted for his name thereon, as occupant or *bond fide* tenant of real property of the actual value of \$300 in the town of Prescott, to wit, part of lot letter L. in park lot three on the north side of Park Street in the East Ward of the said town of Prescott, on grounds disclosed in affidavits and papers filed.

The affidavit of *McCulloch*, filed on obtaining the rule *nisi*, shewed that he was of the full age of twenty-one, and a subject of Her Majesty by birth, and not disqualified under sec. 2 of the Election Law of 1868, and not otherwise prevented from voting at elections for the Legislative Assembly or House of Commons, if he had sufficient property qualification: that he was advised and believed he was

entitled to be rated as the actual and *bonâ fide* tenant of real property in Prescott of the value of \$300 : that on the 21st of March, 1874, he went into possession of part of lot letter L. above mentioned, being the premises for which James Cosgrove then appeared on the assessment roll and the premises for which James Cosgrove is entered as No. 44 on the voters' list : that James Cosgrove was in possession of the premises up to and within a week of the time when McCulloch took possession, and was there when the assessors went round to make their assessments ; but he, McCulloch, was in possession when the assessment slip was delivered, which was done four days after McCulloch took possession : that immediately on receiving the slip he attended on one of the assessors, whom he asked to change the assessment, as Cosgrove had left the house and gone to live next door, which the assessor refused to do : that thereupon he applied to the Court of Revision, but the principle upon which that Court acted was to make no change in the names of persons assessed, provided the assessors had the proper name down of the party who was in possession when they went round, and this principle, combined with some technical objections, resulted in the appeal to the Court of Revision being thrown out : that from his taking possession up to the final revision of the assessment rolls he remained in possession of the said premises, and still resided there, and, using the words of the oath of qualification of a voter contained in schedule " O." to the Election Law of 1868, in his affidavit, declared himself a duly qualified voter in respect of the premises for which James Cosgrove was assessed : that within thirty days after the clerk of the municipality had posted up the list of voters, he caused a complaint to be entered with said clerk, and all things were done to entitle him to have his complaint heard by the County Court Judge, and it came on to be heard on the 27th day of October, and he attended to prove the facts aforesaid with his attorney ; but an exception was taken to the complaint, that in the complaint it was alleged " that at the time of the last final revision of the assessment roll on which said list is based, I was and now am actually and *bonâ fide*

the tenant," &c., instead of being tenant when the assessment was made: that the Judge allowed the exception and dismissed the complaint without further enquiry, on the ground of insufficient notice: that the assessment rolls were returned on the 2nd of April, after McCulloch entered into possession, and the 1st of May was the day fixed by law for their return: that the final revision took place on the 29th of May, and no appeals having been lodged against the Court of Revision, the roll was declared finally revised on the 7th of July.

On the 13th of November, 1874, the matter was argued before Richards, C. J., sitting alone under the Administration of Justice Act.

Osler shewed cause. If the possession had been changed after revision, Cosgrove might have been entitled to vote, now neither he nor McCulloch can vote. The objections taken before the learned Judge below were sufficient, and it is submitted that his decision is final.

J. B. Read contra. McCulloch received the assessor's slip, and before the time for that officer to make his return expired, asked to have his name inserted as tenant. That not being done, he applied to the Court of Revision, and that Court decided on a wrong construction of the statute. See schedule O. to 32 Vic. ch. 21, O.; Ballot Act of 1874, 37 Vic. ch. 5, sec. 8, sub-sec. 3, O.; 32 Vic. ch. 21, sec. 5, O.

RICHARDS, C. J.—I think the technical objections as to matters of form before the learned Judge of the County Court ought not to prevail. Such objections as that "the Judge" was irregular, because it was not "the Judge of the County Court of the United Counties of Leeds and Grenville," when there could be no mistake who was the judge meant, seems like returning to special demurrers. Objections such as these ought not to prevail when no one can be misled or injured by the alleged errors.

I think, therefore, notwithstanding such objections as these, the enquiry before the learned Judge should go on.

As to the main question, though not entirely free from

doubt, I think when an assessor has reasonable notice before he returns his roll that a change in occupancy has been made, and he omits to make the necessary changes, it may properly be considered when the assessor fails to do this that he has wrongfully refused to insert the proper name on the roll.

The matter can always be enquired into by the Court of Revision, and I think that Court may, at any time before the final revision, make the necessary changes.

The County Judge, I think, under the last statute, may, in this respect, do what could properly be done by the Court of Revision at the time that Court was sitting.

The oath to be taken by an elector, 32 Vic. ch. 21, O., schedule O, shews that Cosgrove, whose name was properly enough put on the roll when the assessor went round, could not vote because he was not "at the time of the last revision" of the roll *possessed* of the real estate in respect of which his name was entered on the roll.

McCulloch was in possession when the notice of the assessment was left at his house, and within *four* days he notified the assessor and appealed to the Court of Revision, and he was in possession at the final revision. I think, under the circumstances, his name ought to be entered on the list.

The presumptions of law are always in favor of the franchise, and Acts of Parliament should be worked out to confer the franchise on those who seem within the spirit of the law entitled to it, rather than be strained to deprive parties of a right to vote.

The mandamus will go to the learned Judge to enquire into and decide whether or not the name of McCulloch is improperly omitted from the Electors' Roll for the town of Prescott for the year 1874, and whether Cosgrove's name should not be struck off the said Roll and McCulloch's substituted therefor.

Rule absolute.

IN THE COURT OF ERROR AND APPEAL.

J. K. ALEXANDER, (administrator of W. T. Alexander),
Plaintiff in the Court below, *Appellant*, v. TORONTO
AND NIPISSING RAILWAY COMPANY, Defendants in the
Court below, *Respondents*.

R. W. Co.—Accident through negligence—Contract limiting liability.

Declaration, under C. S. U. C. ch. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages, loaded with timber, along the line near said station, that a piece of timber, projecting from said carriages, struck and killed the said A.

Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise.

Held—affirming the judgment of the Court below, Draper, C.J., dissenting—plea good, without alleging that A. was a party to or aware of the agreement.

This was an appeal from the judgment on demurrer in this case reported in 33 U. C. R. 474.

The following are the grounds of error taken to the judgment below, being the same as those taken as grounds of demurrer to the plea.

1. That the contract or agreement set out in the plea is no answer to the action, it not being alleged that the plaintiff or the said William James Alexander, or either of them, were parties to the said contract or agreement set out in the said plea, or that they or either of them in any way assented to the same.

2. That the declaration discloses a cause of action independent of contract, whereas the said plea is only an answer to an action for tort founded on contract.

3. That the contract or agreement set out in the said plea could not be binding on the plaintiff in this action.

4. That the contract or agreement set out in the said plea, in so far as it seeks to relieve the defendants from liability for any loss or injury occasioned by their negligence and wilful default, is void, the same being unreasonable.

The case was argued in appeal on the 13th January, 1874 (*a*).

Harrison, Q. C., and *Reeve*, for the appellant.

M. C. Cameron, Q. C., for the respondent.

The arguments used and the authorities relied on were substantially the same as in the Court below, and are therefore not repeated here.

DRAPER, C. J. of Appeal (*a*).—The declaration is founded on the general obligation that no one shall, by negligence or carelessness in the conduct of his own affairs, do hurt or injury to another. The introductory part is merely to shew the nature of the defendants' business and premises, part of which consisted of a platform, and then it is stated that A. was lawfully on that platform. Then defendants are charged with negligent and unskilful management of an engine and carriages on which was certain timber, through which negligence a piece of timber struck and injured A., who afterwards died in consequence thereof. The claim is therefore grounded on a wrong and injury done to A. by defendants' negligence. No contract is asserted, nor any duty arising from contract, nor is the injury connected with any breach of contract, or of such duty.

The plea sets up an agreement between C. and the defendants by which defendants undertook to carry C. and C.'s agents and newsboys on their trains, (no consideration being shewn), without incurring responsibility for any injury to C. or his agents or newsboys, either to their persons or property, averring that A. was one of C.'s newsboys,

(*a*) Present: DRAPER, C. J. of Appeal; RICHARDS, C. J.; SPRAGGE, C.; HAGARTY, C. J.; GALT, J.; STRONG, V. C.; BLAKE, V. C.

(*a*) On the 18th December, 1874. Present: DRAPER, C. J. of Appeal; RICHARDS, C. J.; SPRAGGE, C.; HAGARTY, C. J.; GALT, J.; BLAKE, V. C.

and was upon the said train and the said platform, and was injured and killed by reason of an accident happening as in the declaration alleged.

The plea therefore asserts an agreement, which, as set forth, shields them from liability for any accident, though caused by their own negligence, in carrying C. or C.'s newsboys or agents, on defendants' trains. Unless the Court must intend that injury in carrying C. or the newsboys includes accidents on the platform, the plea is no answer, for the word train does not occur in the declaration any more than platform does in the agreement. And the addition of the words, "and the said platform" in the latter part of the plea, cannot enlarge the meaning of the agreement.

It may be said—I think it was said during the argument—that A. might have been standing one foot on the train the other on the platform, but the description of the accident suggests that the train was in motion, in which case A. could hardly have stood on a stationary platform and a moving train on which the timber was at the same time. The plea certainly treats the trains and the platform as two distinct things. However, this was not taken as a ground of demurrer, nor is it given as a reason of appeal.

But passing this over, the more important question arises whether the agreement as pleaded was binding upon A. It is necessary to keep in view that the declaration is not founded upon either a contract or a duty arising from contract to carry him safely. It is not alleged that he was a passenger by the railway, unless that can be inferred from the statement that the defendants used a certain railway or station on the said railway for the reception and accommodation of their passengers, and that A. was lawfully using the platform of the said station.

For all that the declaration shews, A. was on the platform of a station appurtenant to a railway for some lawful purpose, and was injured by defendants' negligence. The cause of action is therefore a personal injury to Alexander.

The plea traverses no statement in the declaration, but relies on the agreement already set forth. Now the whole

agreement on the defendants' part is, that they should carry Chisholm, his agents and newsboys, on the said trains, and should not be liable for any injury to the person or property of Chisholm or Chisholm's newsboys or agents from any accident happening to any of them, whether the accident should arise from the wilful default, misconduct, or negligence of defendants, or of their servants, or from any other cause. Alexander was no party to this agreement. It is not even alleged that he had notice of it. That he, assuming him to be an infant, would not have been bound, had he entered into it, is I think clear, for it was not, as far as I see, a contract for his benefit.

In *Regina v. Lord*, 12 Q. B. 757, the cases are collected and the principle is clearly enunciated. It cannot be for an infant's advantage to deprive himself of all remedy for a personal injury arising from the wilful negligence of another, particularly where there is no consideration moving from the party contracted with to the infant.

Granting that his being employed as a newsboy was advantageous to him, that advantage did not move from the defendants.

Nor is there any ground for holding that the relations between Alexander and Chisholm were such as could deprive Alexander, or authorize Chisholm to deprive Alexander, of any personal right. The relation of master and servant is the only legal relation shewn to have existed between them, and it is not pretended that such a relation would enable the master to release the right of the servant to recover damages for a personal injury inflicted by a stranger. It is clear that the only person who can sustain an action for damages for an injury to the person is the sufferer, though the master may have his remedy for damage consequential to himself upon a personal hurt to his servant: *Pippin v. Sheppard*, 11 Price 400; *Martinez v. Gerber*, 3 M. & G. 88, 5 Jur. 463. And Alexander, though an infant, could have maintained such an action for the personal injury: *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Austin v. Great Western R. W. Co.*, L. R. 2 Q. B. 442.

Martin v. Great Indian Peninsular R. W. Co., L. R. 3 Ex. 9, has some resemblance to the present case. There the second count of the declaration stated that the plaintiff was an officer in Her Majesty's service, and as such was received by defendants as a passenger with his baggage, to be by defendants safely carried, and averred the loss of his baggage through the gross negligence and carelessness of defendants. The plea stated that the plaintiff was a passenger on defendants' line as and being such officer on duty, and the luggage was carried under a contract for the conveyance of the officers and soldiers then on duty made between defendants and Her Majesty's Indian Government for the conveyance of troops with their baggage from, &c., of which officers plaintiff was one, and of which baggage plaintiff's baggage formed part: that the plaintiff and his luggage were carried under said contract and under no other, nor did plaintiff pay or agree to pay any reward to defendants for such conveyance. The plea was demurred to, and the plaintiff had judgment, Channell, B., saying that the count was not to be considered as charging a mere breach of contract, but as charging something done by defendants in the nature of an affirmative act injurious to the plaintiff's property. Here the plaintiff relies on no contract, but sues *ex delicto*, complaining of an affirmative act injurious to his person.

Bramwell, B., puts the point in the form of a dialogue between the plaintiff and defendant, which a trifling adaptation makes applicable to our case. Plaintiff says, "You did me great hurt and injury by your gross negligence." Defendants answer, "We were carrying you on an agreement with another person under which we stipulated for immunity."

Baron Bramwell asks, p. 14, "How does this furnish an answer? The contract is no concern of the plaintiff's; the act was none the less a wrong to him." By another of the pleas in that case it appears the contract contained these words: "*the company accepting no responsibility*," which the Court held would not be applicable to luggage lost

through their mere negligence. See also *Collett v. London and North Western R. W. Co.*, 16 Q. B. 984.

Alton v. The Midland R. W. Co., 19 C. B. 213, contains a very complete collection of cases down to that time, as to the right of action by a master for a personal injury sustained by his servant through the negligence of the defendants, but it does not directly touch the question raised here, beyond affirming the proposition that one who is no party to a contract cannot sue in respect of a breach of duty arising out of that contract. Here the question is, can a party who is injured by the negligence of another be prevented from recovering damages by reason of a contract to which he was no party.

I refer also to *Becher v. Great Eastern R. W. Co.*, L. R. 5 Q. B. 241, as illustrative of the question of parties not being those contracted with being without remedy, there being a contract with another which related to the property lost.

In my opinion the plaintiff is entitled to judgment on this demurrer.

HAGARTY, C. J.—I think the plea gives a sufficient *prima facie* answer to the declaration, and it lies on the plaintiff to answer it by replication.

The allegation in the plea is, that deceased was on the train and platform, under and by virtue of the agreement. This is a traversable matter, and a replication taking issue upon it will bring up all the facts on which the plaintiff can possibly rely to recover.

RICHARDS, C. J.—I have nothing to add to what I said below, except that in the *Times* newspaper, of the 9th of April, there is a notice of a case of *Gallin v. The London and North Western R. W. Co.* (a), which appears to be like this.

SPRAGGE, C., concurred in the judgment of the Court below.

(a) Since reported, L. R. 10 Q. B. 212.

BLAKE, V. C.—William James Alexander was travelling on the line of the defendants' railway while in the employ of the Messrs. Chisholm, who had contracted with the defendants that their newsboys and agents would be carried on certain terms.

Alexander, by virtue of this agreement, travelled on the defendants' line, and doing so I think he must be taken to have accepted the terms on which the Company agreed to carry him. Having become a passenger on the railway under the agreement his employer made, he must be bound by the contract, under which he is permitted to travel, as to all those terms which the Company could properly impose, and have imposed upon him. It is clear from the authorities that the Company could, as they have here done, qualify their liability as to persons situated as the Messrs. Chisholm and their employees, and that they have made such an arrangement in the present case as absolves them from a responsibility which they would otherwise have been under, on account of the accident which happened to the person represented by the plaintiff.

There is no statement that William James Alexander was, at the time of the accident, an infant, and, therefore, the question argued that being an infant he is not bound by the agreement cannot properly be raised.

We cannot infer from the use of the word "newsboy," that the person thus designated was under the age of 21.

There are aged boys as well as newsboys, and I do not think we can necessarily conclude that a person to whom the appellation of "the boy" or "the newsboy" is given is an infant.

I think the appeal should be dismissed with costs

Appeal dismissed with costs.

HACKING V. THE CORPORATION OF THE COUNTY OF PERTH.

County corporations—Right to acquire township roads—Municipal Act of 1866, sec. 341—C. S. U. C. ch. 49 s. 69.

The corporation of a township having constructed a gravel road, on which they were levying tolls, arranged with the corporation of the county for the assumption by the county of this and other roads as county roads, and removing the tolls therefrom; and by deed conveyed the road to the county, on condition that it should revert to the township again in the event of tolls being imposed. The county gave debentures to the township for the purchase money, took possession of the road, and made repairs thereon.

Held, in appeal, that the county could not acquire the road under sec. 341 of the Municipal Act of 1866, it being already a gravel road, and that they had no power otherwise to purchase it, though the township by C. S. U. C. ch. 49, sec. 69, were authorized to sell.

Held, also, that the road therefore not being vested in the county, they were not liable for neglect to keep it in repair.

APPEAL from the decision of this Court.

DECLARATION: For that the defendants, before and at the time of the injury and damage accruing as hereinafter mentioned, had vested in them and were possessed of a certain public road or highway running from the town line between the townships of Elma and Logan, in the county of Perth, to the village of Mitchell, in the said county, and by virtue of the statutes in that behalf the defendants were bound and it was their duty to keep the said road passable and clear of obstructions, and not to allow obstructions to remain in and upon the said road; yet the defendants negligently and wrongfully suffered a certain tree, which had theretofore fallen upon and across the said highway, and was then dangerous to persons passing along the said road and an obstruction thereto, to be and remain so lying upon and across the same up to and at the time of the injury and damage aforesaid, and did not remove the said tree; whereby the plaintiff, whilst he was lawfully driving along the said road in the night time, drove his horse and carriage against the said tree, and upset the said carriage, and broke the same, and the plaintiff, who was then riding in the said carriage, was thrown out and injured, and incurred expense for nursing and medical attendance, and for repairing the said carriage, and was unable for a long time to attend to his business.

Pleas.—1. Not guilty. 2. That at the time of the happening of the said alleged injury and damage, the said public road or highway, in the declaration mentioned, was not the public road and highway of the defendants as alleged. Issue.

The trial took place before Morrison, J., at Stratford, at the Fall Assizes of 1872.

The plaintiff sufficiently proved the injury he had received, and that it proceeded from the cause stated in the declaration. The accident happened on the 6th May, 1872. The tree had fallen across the road in the commencement of the previous winter, and all that had been done to enable vehicles, &c., to pass was done by a resident in the neighbourhood, who chopped out a piece about nine feet long from the tree at the part of the road which had been gravelled. The tree had fallen in a slanting direction, and “there was not room for a team to pass squarely through it.” The real dispute was whether the road was so vested in the defendants that it was their duty to keep it in a passable state.

To establish their liability, the plaintiff put in the following documents:—

1st. By-law 76 of the Corporation of the township of Logan, passed 28th of February, 1861, by which it was recited that the road in question was a gravel road, made and constructed by that Corporation, on which tolls were collected, under the authority of the several Acts of Parliament in that behalf, and of the by-laws of that Corporation; and it was enacted that the same road is “hereby established and assumed by the said The Corporation of the township of Logan as a public highway of the said Corporation.”

2nd. By-law of the same Corporation, No. 121, passed 12th December, 1868, which recited that arrangements had been made for the assuming and maintaining as county roads by the Corporation of the county of Perth certain roads, (including that now in question), upon a condition thereafter expressed, and enacted that the said roads should

and might be assumed as county roads ; and the Reeve of the township of Logan was authorized and directed to execute a deed conveying to the Corporation of the county of Perth all the estate, right, title, interest, and easement of the said township to the road in question, conditioned for the reversion and conveyance to and assuming by the Corporation of the said township of the said road, in the event of tolls being at any time thereafter imposed, &c., or sought to be imposed, &c., thereon.

3rd. A deed dated 16th December, 1868, made between the Corporation of the township of Logan of the first part, and the Corporation of the county of Perth of the second part, whereby—after reciting an agreement that the county of Perth should pay to the township of Logan the sum of \$10,000, payable at the maturity of the gravel road debentures issued by the township of Logan, and should assume certain roads thereafter mentioned, and remove the tolls therefrom by the 1st of January then next—it was witnessed that the township of Logan granted and sold to the Corporation of the county of Perth and their successors for ever (among other things, the road referred to in this suit), to hold to them, their successors and assigns, to their own use, for the purpose of a public road and highway ; provided always, that if any tolls should be imposed or collected or sought to be imposed or collected on the said road, then the same was at once to revert and be conveyed to and become the property of the township of Logan. This indenture purported to be executed by the Reeve of the township of Logan under the Corporate seal of the township. There was nothing to shew that the Corporation of the county of Perth executed it. It was stated in the attestation to have been executed in duplicate. There was a covenant to reconvey pursuant to the proviso.

4th. The plaintiff also put in a by-law of the county of Perth (No. 141), passed 19th June, 1868, which recited that provision had been made for the purchasing and assuming by the county of Perth of certain gravel roads, (including that referred to in this action), and enacted that the same

were thereby assumed by the county of Perth as county roads. This by-law purported to be signed by the county clerk and was not shewn to be under the corporate seal.

5th. Also by-law No. 156 of the county of Perth, passed 27th January, 1870, which recited the same agreement as was recited in the deed by the township of Logan of 16th December, 1868, and authorized the issue and delivery to the township of debentures of the county, not to exceed in amount \$10,000, and imposed a special rate for paying the principal and interest of the debentures.

It was said that this by-law had not been sealed, and it was signed by the Clerk only, not by the Warden.

It was proved that the indenture of 16th December, 1868 (or one part of it, as it purported to have been executed in duplicate), was given to the solicitor of the county, who gave it to the clerk or officer of the county, and that since the conveyance the defendants took possession of the road, sold the toll-house, and made repairs on the road. It was also admitted that the county of Perth had given debentures to the township of Logan for the road. Apparently these were given under the agreement and by-laws or some of them.

By-law 167 of the Corporation of the county of Perth, which recited that the county had assumed the gravel roads referred to in the foregoing by-laws as county roads, and then repealed all by-laws theretofore passed for the assumption by the county of Perth of or for maintaining and repairing, the said roads or any of them, and declared that all the said roads should stand and be, so far as the county was concerned, in the same plight and condition as if those by-laws had never been passed; and repealed all portions of all by-laws theretofore passed by the Council, which were inconsistent therewith. This by-law was passed on the 8th February, 1871.

The defendants' counsel objected that there was no evidence sufficient in law to sustain the allegation in the declaration that the public road or highway mentioned therein was vested in the defendants, or that they were possessed

thereof; that neither the by-law of the county of Perth, No. 156, nor the deed of 16th December, 1868, were signed by the Warden or sealed with the seal of the Corporation of the county. The objection was overruled, leave being reserved to defendants to enter a nonsuit.

In Michaelmas Term, 1872, *McCulloch* obtained a rule *nisi*, to enter a nonsuit, pursuant to leave reserved.

In Hilary Term *Anderson*, Q. C., shewed cause, and *Harrison*, Q. C., and *McCulloch* supported the rule.

The argument is given post p. 467, on the application to the Court of Error and Appeal.

RICHARDS, C. J., delivered the judgment of the Court (*a*).

On behalf of the plaintiff it was argued that the Court of Common Pleas had expressly decided that the defendants were bound to repair the road in question and were consequently liable in this action. We have been favored with a copy of the judgment of the Court of Common Pleas in this matter (*b*), and the grounds on which the judgment in that Court proceeds are, that inasmuch as the road in question was constructed by the township Council and made a toll-road, the defendants could not acquire it under the 341st section, of the Municipal Act. "But although the County Council might not be able so to assume a township road which had already been gravelled, planked, or macadamized by the township Council, it could, as a Corporation, acquire by contract that which by 22 Vic. ch. 49, the township municipality was authorized to sell."

The learned Judge who prepared the judgment of that Court, after reciting the several by-laws of the township and County municipalities and the conveyance by the township to the defendants, proceeds: "A road so acquired and purchased, appears to me to be acquired as any pro-

(*a*) This judgment was delivered in Easter Term, 1873, but the report was deferred, as it was understood that the case would be at once carried to appeal.

(*b*) Not yet reported.

erty is by bargain and sale between private purchasers ; and the purchaser becomes entitled to take the property to the full extent of the terms of the contract, and subject to all liabilities by law attaching to the ownership of property. The County Council cannot, therefore, divest themselves of the property transferred by the deed otherwise than by contract. They cannot, by their own mere act of passing a by-law, professing to repeal the by-law passed sanctioning the purchase, as if it was a mere by-law for assuming the township road as a County road, under the 341st sec. of 29-30 Vic. ch. 51, divest themselves of the responsibility which, by contract with the township perfected by the deed of transfer to them of the right and interest of the township in the road, they have assumed." The Court there held that the defendants were bound to repair the highway in question.

The argument by the defendants to distinguish this case from that in the Common Pleas was, that in that Court the by-law authorizing the assuming of the road was regularly passed and under the seal of the Corporation, whereas it is shewn here that it wanted the seal.

By-law No. 156, passed 27th January, 1870, does not appear open to the above objection ; and that recites that it had been agreed between the Corporation of the County and the Corporations of the said townships, that the said county should assume the said road as a county road, and as a compensation should deliver debentures of the county to the townships for a total of \$11,000. It further recites, amongst other things, that the township had agreed to accept the debentures for payment to them for giving up the road and the assumption of the same by the county.

The by-law then enacted that the Warden was authorized and required to execute and deliver to the township of Logan a debenture of defendants for \$1,000, and to the township of Elma another debenture for \$10,000, payable on 1st August, 1876. They then ordered the levy of a rate on the ratable property of the county, to pay the debentures and interest, and, lastly, directed the by-law to

come into force on the 29th of January, 1870. This would seem, in connection with the recitals and the former incomplete by-law, to shew sufficiently an assuming of the roads by a by-law, or at all events a sufficient agreement under seal, to assume to bring the case within the *ratio decidendi* in the Court of Common Pleas.

In that Court it was held the County Council could not have assumed this road under the 341st section of the Municipal Act, but that inasmuch as the township municipality was, under sec. 69 of Consol. Stat. U. C., ch. 49, authorized to sell the toll-road, therefore the County Council was authorized to purchase it, and in that way they have acquired the title under the agreement and conveyance of the road to them. If the road was, in fact, assumed by the defendants under the by-law referred to, and could only be assumed in that way, then inasmuch as by by-law No. 167, passed on 8th February, 1871, before this accident occurred, they had repealed all by-laws assuming county roads, it would appear that the defendants are not liable in this action.

The whole case must therefore turn on the question whether the County Council, under sec. 69 of the Road Companies Act, could purchase this road as a public work, without assuming it as a county road under sec. 341 of the Municipal Act, as already mentioned. The acquiring of a road in this way seems hardly within the general powers of the county municipality. It is not the municipality representing the interest in this matter of the locality through or along the boundary of which the road passes, and certainly in the express powers given to the County Council by the Municipal Act they are not authorized to become the purchasers of improvements of this kind.

However, as this point has been expressly decided by the Court of Common Pleas, we think it better to follow that decision and discharge the rule granted in this cause, leaving it to the defendants to take the necessary steps to have the decision of the question as to their liability in this matter reversed in the Court of Appeals, if so advised.

Rule discharged.

From this judgment the defendants appealed, for the following reasons:—

1. The road was not one which the Township Council was empowered to sell and convey under sec. 69 of Consol. Stat. U. C., ch. 49, or otherwise, so as to vest the same in the purchaser.

2. The road was not one which the County Council had power to acquire by purchase, except as permitted by sec. 341, of 29-30 Vic., ch. 51, so as to vest the same in the County Municipality.

3. There was no acceptance of the alleged deed thereof from the Township Municipality to the defendants, so as to vest the same in the defendants.

4. There was no legal by-law assuming the said road, under sec. 341 of 29-30 Vic., ch. 51.

5. The by-law, if any, was repealed before the happening of the accident, in respect of which the plaintiff claims.

6. The road was not one at the time of the happening of the accident vested in the defendants within the meaning of sec. 339 of 29-30 Vic., ch. 51, or otherwise, so as to render them liable to be sued in a civil action for the recovery of damages.

The case was argued in appeal on the 15th of January, 1874 (a).

R. A. Harrison, Q. C., for appellants. The defendants admit negligence if they own the road, but they deny liability to a civil action, as set out in the sixth reason of appeal. The declaration does allege that the road was vested in defendants, but it does not state in what manner, nor whether the road is in a township, or between two townships. On the evidence it is not a road between two townships, but is wholly in the Township of Logan, as a reference to by-laws 76 of Logan and 141 of Perth shews. Some of the roads in the by-law could not be assumed: *Regina v. Perth* (C. P., referred to in the judgment of the

Court below, but not reported.) By-law 141 of Perth is conditional on the assent to it of the municipalities mentioned in it, and some of them never assented, and there is no proof of the performance of the conditions contained in it. It is not a by-law, for the corporate seal is not attached. As to by-law 121 of Logan, the township could not sell, nor the county buy such a road. Next, the indenture of the 16th December, 1868, is defective. It does not recite any by-law, but an agreement to assume the road by the county. It does not recite that the road had been assumed. [RICHARDS, C. J.—The consideration was paid as if the road had been assumed]. There may have been a breach of trust in paying over that money, but that is not to saddle the defendants with liability for ever. The indenture purports to recite an agreement. No such agreement was or could legally be made. By-law 156, of Perth also refers to an agreement, “whereas it has been agreed.” This cannot be called a recital of a by-law. If so intended, there is no valid by-law to recite, as the corporate seal was not attached.

By-law 167 was not referred to originally, but the Chief Justice of Ontario, in the Court below, compelled its being made part of the case when found among the exhibits. It was not referred to on the argument below. It appears to have been filed at *Nisi Prius*. The injury to the plaintiff took place on the 16th May, 1872.

The case resolves itself into two questions. 1. Was the road vested? 2. Is there a civil action? We say, first, the road was not vested. We start with the proposition, that corporations are the creatures of the statutes; they have no powers than those given directly or to be inferred, or which are necessary to their preservation: *Dillon's Mun. Cor.*, vol. i., 2d ed., 173, and the cases there cited. The road at one time was in the Township of Logan, and the township then was the proper party to sue: *Harrison's Municipal Manual*, 1874, p. 400 *et seq.* The Township of Logan could not convey the soil and freehold as they purported to by the indenture of the 12th December, 1868.

The soil and freehold remains in the private parties, when private parties dedicate the road, and in the Crown when the Crown lays out the road: *Whiteside v. Bellchamber*, 22 C. P. 241; Municipal Act of 1866, secs. 316, 338; *Mytton v. Duck*, 26 U. C. R. 61.

The power to sell a franchise must be given by statute. The power to sell here is vested in the municipality: Consol. Stat. U. C., ch. 49, sec. 69. This section refers to roads built by joint-stock road companies, and should be read as only allowing the sale of such roads. The other sections of the statute, applying to sales of roads, apply to municipalities only through which the roads run. See secs. 3, 60, 69, 70, 84; *Regina v. The Corporation of the Town of Paris*, 12 C. P. 445; *Regina v. The Corporation of Louth*, 13 C. P. 615; *Totten v. Halligan*, 13 C. P. 567. The county, at all events, could not acquire the road by purchase: *The Corporation of Wellington v. Wilson*, 14 C. P. 299. The liability to keep a road in repair is in the nature of a tax, and should be construed strictly; but admitting the power to assume the road, there has been no assumption by by-law. No seal has been affixed to the paper called a by-law: *Re Croft and The Municipality of Brooke*, 17 U. C. R. 269. It has not been recognized or recited till in the by-law which repeals it. The by-law is conditional, depending on certain acts of the municipality, of the performance of which there is no proof. The county could not acquire roads in cities, towns, or villages: *The Churchwardens of St. George's Church v. The Corporation of the County of Grey*, 21 U. C. R. 265, 268. Assume that the by-law was a perfect and valid by-law, it was repealed before the cause of action accrued, and the plaintiff's case is gone. The assumption of the road, or exclusive jurisdiction over it, does not vest the road: *The Corporation of the County of Wellington v. Wilson*, 16 C. P. 124. The deed was never accepted: *Shep. Touch.* 57, 58. [STRONG, V. C.—It did not require acceptance: *Doe d. Garmons v. Knight*, 5 B. & C. 671]. *Harrison*, Q. C., also referred to *Dyde v. St. Pancras Guardians*, 27 L. T. N. S. 342, *Dillon's*

Mun. Cor., vol. i, secs. 521, 785, pp. 624, 903; *The Town of Waltham v. Kemper*, 55 Ill. 346; *Regina v. Canterbury*, L. R. 6 Q. B. 9, 614; *Cubitt v. Mansie*, L. R. 8 C. P. 704; *Hawkshaw v. The District Council of the District of Dalhousie*, 7 U. C. R. 590; *Harrold v. The Corporation of the County of Simcoe*, 16 C. P. 43 18 C. P. 9; *Wilson v. The Mayor of Halifax*, L. R. 3 Ex. 114.

M. C. Cameron, Q. C., contra. This acquisition of the road is not *ultra vires*, for the county has the power to open roads: *Dennis v. Hughes*, 8 U. C. R. 444. If so, why not to assume roads already opened. The cases of *Harrold v. The Corporation of the County of Simcoe*, 16 C. P. 43, 18 C. P. 9, and *The Town of Waltham v. Kemper*, 55 Ill. 346, shew that a county is liable for negligence. In *Regina v. The Corporation of the Town of Yorkville*, 22 C. P. 431, it was held that where money was expended on a road, the corporation was liable for non-repair. The cases collected there fully bear this out. The present case is a much stronger one than that cited. The defendants have taken the benefit of the transfer of the road, and cannot deny their liability. As to the want of the seal, the defendants cannot set that up. They have acted on the by-law as if valid, and have induced others so to act, and they are bound by it. The recital that the two corporations "had agreed" must be assumed to mean that they "legally agreed," else there was no agreement. The council could not, by a subsequent by-law, get rid of the road and their liability so long as the deed stands. The statute should receive a liberal construction as to power to make roads.

18th December, 1874.

DRAPER, C. J. of Appeal.—The judgment appealed from was apparently given rather to have the question decided in appeal, than as a judicial decision of the case.

The power of the County Councils to assume exclusive jurisdiction over roads and bridges lying within any township in the county, must be considered in connection with the condition or duty attached to such assumption, which

is that with as little delay as reasonably may be, and at the expense of the county, they cause the road to be plank-ed, gravelled, or macadamized, or the bridge to be built in a good and substantial manner.

This is enacted by 29-30 Vic. ch. 51, secs. 341, 342, and it is an exception to the general rule declared in sec. 317 of the same statute, which enacts that every Municipal Council shall have jurisdiction over the original allowances for roads, highways, and bridges within the Municipality.

It is easy to perceive that one motive for conferring on the County Councils the power to assume this exclusive jurisdiction was to facilitate the construction of a continuous road through several townships, the Municipalities of which might be unable or unwilling to undertake to extend roads beyond or through their respective boundaries.

I concur in the judgment of the Court of Common Pleas to the extent that this is not a case coming within the two sections of the statute to which I have referred, and that the County Council can only assume exclusive jurisdiction over roads in regard to which they can fulfil the conditions to plank, gravel, or macadamize. The case of *Re Rose and The Corporation of the United Counties of Stormont, Dundas and Glengarry*, 22 U. C. R. 531, affirms this conclusion, namely, that the assumption by by-law of exclusive jurisdiction over a road within a township, imposes on the County Council so assuming the duty of construction or improvement according to circumstances, and leads to the conclusion that where a road has been already planked, gravelled, or macadamized, or a sufficient bridge has been erected, the County Council have not authority to assert exclusive jurisdiction over it.

The recital to the by-law, No. 121, clearly shews that the Township Council treated the arrangement as a matter of contract, and not an exercise of right on the part of the County Council; and so the by-law of the County Council No. 141, though objected to for want of a seal, affords very satisfactory evidence that on their part they con-

sidered themselves as purchasers; and their by-law No. 156, authorizing the issue of debentures to compensate the township for their expenditure on this road, confirms this conclusion, and it is only in their repealing by-law that they expressly treat their former proceedings as "assuming and providing for the assumption" of the roads therein mentioned as county roads, without any distinct reference to the fact of purchase, which was the main feature of the prior by-laws. The indenture of sale sets out the agreement, and it is not shewn to have been sealed by the County Corporation; it was delivered to one of their officers and they took possession under it.

Treating the transaction, therefore, not as an ordinary exercise of the power of assuming exclusive jurisdiction, but as a purchase, and, therefore, as not within the provisions of the 341st section of the Act, I do not see how the repealing by-law affects the matter in dispute, for the repeal there spoken of refers only to a by-law for assuming a road within a township, and not to a road purchased by the County Council.

Then arises the question suggested by the Court of Queen's Bench in the judgment appealed from, whether the County Council, under secs. 68 and 69 of the Road Companies Act, had power to purchase this road under the circumstances appearing.

Municipal Corporations or Companies and Municipal Councils are referred to in the 61st, 63rd, 64th, 65th, 66th, 68th, and 69th sections of this Act. Some of these have no bearing whatever on the question raised.

The 63rd section authorizes Municipal Councils, under specified conditions, to subscribe for, hold, sell and transfer stock in any Road Company formed under the Act, and the 64th authorizes the payment out of Municipal funds of all instalments upon stock subscribed for and acquired.

The 65th, 66th, and 67th sections do not touch the point raised here.

The 68th authorizes any such Road Company to sell to any Municipal Council, representing the interests of the

locality through or along the boundary of which any such road passes, and such Municipal Council to purchase, the stock or any part of the road belonging to such Company.

And the 69th authorizes the Municipal Council to sell any work or macadamized, plank, or other toll-road which they have constructed or purchased, or any stock held in any road or other company.

The 118th section gives the designated municipal authority a right, after a certain lapse of years, to purchase the stock of a Road Company.

Hence, then, it seems clear that the authority to purchase is only conferred upon Municipal Corporations by the 68th and 118th secs. of this Act. The latter cannot apply to the present case, for there was no dealing with a Road Company at all; the power of the Road Company is clearly defined, and the authority given to the Municipal Council is to purchase the stock of any such Company or any part of the road belonging to such Company.

The power given by the 69th section to Municipal Councils is to *sell* any road they have constructed or purchased. When the Legislature intended to give the power to purchase, they defined, and very expressly, that the purchase was to be made from the Road Companies. So in the 69th section they do not touch the question of purchasing, but confer the power of selling any work, macadamized or other toll-road which they have constructed or purchased. The Corporation of Logan had the power to sell this road, but neither in the Road Companies Act nor in the Municipal Act in force when this transaction took place, is the power to purchase given.

I think, therefore, that the judgment appealed against must be reversed—and I am led to think, by the language of the Court in giving that judgment, that had the question come before them in the first instance, they would have decided as we do now—and that a nonsuit be entered.

RICHARDS, C. J., concurred, adding that the judgment in the Court below was given out of deference to that of the C.P.

HAGARTY, C. J.—I concur in allowing this appeal. I think County Councils had the right by by-law to rescind all previous by-laws for the assumption of this road as a county road.

I do not think that the contract executed between them and the township prevents this being done.

They agreed to assume the road as a county road, subject to a condition that if tolls were levied thereon it was to revert to the township. The latter received a considerable sum of money for the transfer. The only covenant in the deed on the part of the county is, that in the event of tolls being at any time levied on the road they will convey the same to the township, and hold the road as trustees for the township until conveyance, a curious proviso being in the deed that in such an event the road should *revert*, and *be conveyed*, and become the property of the township.

GALT, J., and STRONG, V. C., concurred.

Appeal allowed.

GILLSON V. NORTH GREY RAILWAY COMPANY.

*Setting out fire—Liability of Railway Co. for negligence of sub-contractor—
Interference of the Company's engineer.*

The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of their work of construction, including the cutting, grubbing, and clearing of the track of trees, &c., to be done to the satisfaction of the defendants' engineer, were let to M. & G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage :

Held, that the contractors, not the defendants, were *prima facie* responsible for the injury, if caused by negligence on the part of those who set out the fire ; and that the evidence, more fully set out below, did not shew such an interference by the engineer as would make the defendants liable.

On appeal the above decision was affirmed ; and *Held*, following *Dean v. McCarty*, 2 U. C. R. 448, Blake, V. C., dissenting, that a proprietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence.

Fletcher v. Rylands et al., L. R. 3 H. L. 330, commented upon, and held not applicable to this case.

BLAKE, V. C., was of opinion, that upon the rule of law laid down in that case, defendants here were liable whether the fire was set out negligently or not ; and that they were responsible for their contractors, because the act done, the setting out of fire, was not collateral, but was done necessarily in the work which the defendants had employed them to perform.

Quære per DRAPER, C. J.—Whether a count alleging only wrongfully permitting a fire to remain on a defendant's land, without averring that it was caused by him, or arose through his negligence, shews a good cause of action.

APPEAL from the judgment in this case reported in 33 U. C. R. 128.

The pleadings and evidence are very fully set out in the report in the Court below, and for that reason are not repeated here.

The grounds of appeal are sufficiently stated in the judgment of the Chief Justice.

The case was argued in appeal on the 12th of January, 1874 (a).

(a) Present DRAPER, C. J., of Appeal ; RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J. C. P., MORRISON, J., GALT, J., STRONG, V. C., BLAKE, V. C.

The arguments were substantially the same as in the Court below.

Harrison, Q. C., for the appellant, cited the following cases in addition to those cited below: *Bush v. Steinman*, 1 B. & P. 404; *Allen v. Hayward*, 7 Q. B. 960; *Reedie v. The London and North Western Railway Co.*, 4 Ex. 244; *Knight v. Fox*, 5 Ex. 721; *Butler v. Hunter*, 7 H. & N. 826; *Tench v. Swinyard*, 33 U. C. R. 8; *Burgess v. Gray*, 1 C. B. 578; *Overton v. Freeman*, 11 C. B. 867; *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488; *Pickard v. Smith*, 10 C. B. N. S. 470, *Ellis v. Sheffield Gas Consumers' Co.*, 2 E. & B. 767; *Gray v. Pullen*, 5 B. & S. 970.

C. Robinson, Q. C., for respondents, cited the following cases in addition to these referred to below: *Wilkins v. Row*, 15 C. P. 325; *Buchanan v. Young*, 23 C. P. 101; *Calkins v. Barger*, 44 Barb. 424; *Fahn v. Reichart*, 8 Wis. 105; *Shearman and Redfield on Negligence*, 3rd ed., 390.

18th December, 1874, (a).

DRAPER, C. J., of Appeal. The first count charges that the damage arose from the defendants wrongfully lighting a fire in the open air on land of which they were possessed, and close to plaintiff's land, when, by reason of the state of the wind and the weather, it was highly dangerous to light a fire; and that, through defendants' negligence in that behalf, such fire spread into plaintiff's land from defendants' land.

The second count charges that the damage arose from the defendants wrongfully permitting to remain upon their land, near plaintiff's close, a fire in a negligent and improper manner, at a time when, by reason of the state of wind and weather, it was dangerous and improper to do so, so that through the defendants' negligence the fire

(a) Present: DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J. C. P., MORRISON, J., GALT, J., BLAKE, V. C.

extended itself out of the defendants' land into plaintiff's close.

The third and fourth counts need not be noticed.

The defendants plead not guilty by statute.

It appears that the defendants had contracted with a firm of Manning and Ginty to construct that portion of the railway referred to in this action, and these contractors had let out different parts of their contract work to sub-contractors.

One of these sub-contractors, Isaiah Winters, sub-let a part of his work to one Linden. Winters had contracted, as to this particular part of the line, to have his work finished by the 1st of September then next.

It was conceded on all hands that there was no other mode of clearing off the timber which it was necessary to cut down except by burning it; and it was sworn by most of the witnesses that, owing to the dryness of the season, it was dangerous to kindle fires in the month of July. Winters, or his sub-contractors, cleared and graded the line for the railway where it passed through plaintiff's land. His contract extended farther east, and (as he swore at the trial), he set fire about the 1st of July about a mile and three quarters from plaintiff's land, but none of that fire extended to plaintiff's land. Then he set fire again about the 25th July, and some of this fire spread a very short distance into plaintiff's land (which, he says, had been on fire in former years).

He represented that he set fire on this occasion under the direction of Mr. McDougall, the resident engineer of defendants, founding this assertion on a conversation in which McDougall said he (Winters) would have to clear up the road—which he could not do without burning the timber; and that McDougall ordered him to cut all the timber and burn it, whereas Winters wanted to throw the trees so that the tops would lie on the adjacent lands, and he could burn the brush in the fall. McDougall did not direct him to set fire on any particular day, but pressed him to proceed promptly with his work, and to burn all

along. According to Winters' statement, what he called the "big fire" occurred in August or September; but there is an overwhelming weight of proof that it happened on the 10th of October, and this fire inflicted the most serious injury on the plaintiff.

It appeared that the contract between Manning and Ginty contained an agreement that the works were to be completed by certain named days "to the complete satisfaction of the Engineer of the Company for the time being in charge of the works:" that if said Engineer considered the number of workmen, horses, engines, plant, or materials insufficient, or that the works were not proceeding with due diligence, he might, by written notice to the contractors, require them to provide what he thought requisite, and if they did not within a reasonable time comply, he might provide what he thought wanting, at the expense of the contractors; and whatever sum the Company had in consequence to pay, they might deduct from moneys becoming due from them to the contractors. And in the sub-contract with Winters; the latter engaged to perform the work specified "according to the directions of the Chief Engineer of the Railway or his assistant, and to his entire satisfaction;" and that he would be responsible for any damage caused to the property of those through whose lands the railway passed, by reason of his acts or those of his workmen employed thereon; and to finish his work by the 1st of September then next, except the fencing and ties.

At the close of the plaintiff's case the defendants' counsel objected:—

1. That the damages were occasioned by a sub-contractor: that neither he nor the contractors were the servants of the defendants, but were engaged independently of the defendants, excepting as expressed in or necessarily to be inferred from the contract.

2. That McDougall's authority extended only to see that the work was done according to the contract, but not to direct the time or manner of it. Leave was reserved to move on each of these objections. They were renewed,

and a rule for a new trial was also moved in the following term.

The Court of Queen's Bench made the rule to enter a nonsuit absolute, on the ground that the action was founded on negligence in the use of fire for a lawful purpose, and that such negligence was the act of the contractors with the defendants, or of the sub-contractor, and unauthorized by the defendants.

The plaintiff appeals against this decision. The reasons of appeal in substance are :—

1. That the defendants, through their Engineer, directed where the timber cut down on the railway track should be piled and burnt, and that it should be set fire to at the time it was ; the jury having found that the fire was made negligently and improperly.

2. That defendants are responsible, because they in effect expressly contracted for the burning of the timber on their land (the railway track), which burning would, according to the evidence, necessarily cause the injury complained of.

3. Defendants are responsible for the neglect of their contractors in setting fire to the timber felled on the track, if the contractors did not exercise that caution which it was their duty to do in making the fire, as a person employing a contractor to do a thing which requires prudence is responsible if the person employed, though not a servant, neglect that duty.

4. Defendants, having employed contractors to clear up their track by setting fire to the timber thereon, are responsible for the resulting injury, on the ground that a person using a dangerous thing on his land is responsible for all the damage which is the natural consequence of its spreading, unless the spreading is a consequence *vis majoris*, of which there is no evidence.

In each of these two counts the plaintiff grounds his claim upon negligence on the part of the defendants ; in the first, that they wrongfully lighted a fire on their own land at a time when, owing to the state of wind and weather, it was dangerous to do so, and through the neg-

ligence of defendants *in that behalf* the fire extended into plaintiff's land; and in the second, that the defendants wrongfully permitted to remain on their own land a certain fire when, owing to the state of the wind and weather, it was improper so to do, so that, by the negligence of defendants, the fire extended itself, &c.

I have not felt it necessary to examine whether the second count states a good cause of action, and will say no more about it than that I do not remember a case in which the declaration did not allege that the fire was made by the the defendant or that the fire arose from his negligence. See *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Viscount Canterbury v. Attorney-General*, 1 Phil. 306; *Filliter v. Phippard*, 11 Q. B. 347. As this count is framed, the fire might have been kindled on the land of another proprietor, and have, by his negligence, extended itself on to the defendants' railway line to their injury.

The important inquiry, however, is, whether the defendants are liable, as the fire in question was made, not by themselves, but by contractors who, except as the contract may otherwise express, were altogether independent of them.

On this declaration it is indispensable for the plaintiff to establish that the injuries for which he claims redress were the result of the negligence of the defendants. On this point I fully adopt the opinion expressed by Sir John Robinson, C. J., in *Dean v. McCarty*, 2 U. C. R. 448.

The subsequent case of *Woodhill v. The Great Western R. W. Co.*, 4 C. P. 449, is almost identical with the present case, determining that a railway company is not answerable for the acts of a sub-contractor, who could not be considered as the servant of the railway company. The original contract being lawful, if the contractor, in carrying it out, inflicts any injury on another, he, and not the company, are answerable for it. In that case, as well as in *Dean v. McCarty*, it was alleged that the fire was made by the respective defendants.

We must not forget that in this country, where clearing

the land is the indispensable preliminary to settlement and cultivation, and where, as a general rule, fire is the principal agent for this purpose, in most cases the only agent after the trees are felled, we cannot treat the use of fire in such cases as an exceptional, far less as a wrongful proceeding. It is not enough, in my opinion, to shew only that a settler set fire to the brush and log heaps on his land in the work of clearing, and that the fire extended into adjoining land, and did damage. Some evidence must be given sufficient to satisfy a Court or a jury that, owing to the state of the wind or weather, or other exceptional circumstances, the act of lighting fires was one which no reasonable or prudent man would have committed.

In this case, there was not only the general experience, but direct evidence that the use of fire was indispensable, in order to clear the line for laying down the railway. This necessity was relied on by Winters to justify his assertion that McDougall *ordered* him to set fire; because, as he swore, McDougall told him that he would have to clear up the road, which, (as Winters also stated) he could not do without burning the timber. McDougall's duty or authority is plain enough, according to the contract and his own evidence, sustained by that of Mr. Manning. It was in brief to oversee the works, to see they were carried on in compliance with the terms and conditions of the contract.

The case of *Steel v. South Eastern Railway Co.*, 16 C. B. 550, resembles this case. There was a contract between one Furness and the defendants, for excavating a road and making an embankment, in the execution of which a drain was cut into and water thereby was let into plaintiff's land, and his crops were damaged. The work was done under the superintendence of Phillips, a surveyor of the Company, who furnished the plans, but it was executed by Furness and workmen in his employment, and the Court held the defendants were not liable, Furness not being a servant of the Company.

Assuming then that neither the nature of McDougall's employment nor his acts as proved affected the defendants,

or imposed any liability upon them, the case resolves itself into the simple question, are the defendants liable for the acts of their contractors; for if not, they cannot be liable for the acts of sub-contractors, between whom and themselves there is no privity. And upon this, I think the authorities are clearly in the defendants' favour.

Not only is negligence made the foundation of the action in both the counts which are above set forth, but the nature and character of that negligence is distinctly averred. It is negligence in setting fire at a time when owing to the state of the wind and the weather it was dangerous to do so. This, as the evidence shews, was the negligence of the sub-contractor Winters, for he shews that he "thought it was dangerous to do so," and the plaintiff must have considered Winters the responsible party, for he brought an action against him for the damage occasioned (as I understand) by the first fire. Winters' own statement would support so much of the claim for which the jury have given \$750 against the defendants—though the two parties could not be liable, because, as Littledale, J., says, in *Laugher v. Pointer*, 5 B. & C. p. 558, "the law does not recognize a several liability in two principals who are unconnected."

In *Daniel v. The Metropolitan R. W. Co.*, L. R. 5 H. L. 45, the injury happened to a passenger on defendants' railway, from the fall of a girder which was being placed over the railway by contractors with the Corporation of London, for a purpose authorized by an Act of Parliament, but with which the defendants were in no way connected.

In giving judgment Lord Westbury observed, at p. 60, that in his view of the case it made no difference whether the contractors were or were not in the employ of the defendants, as the contractors were fit and trustworthy persons for the performance of the work, and he treated this as a material element in the matter, "because the law unquestionably is that the Railway Company had a right to depend on the experience and skill, and sufficiency and care of the contractors." Further on His Lordship said, at p. 61, "The contractors were under the obligation." And he cites

with very decided concurrence the language of Blackburn, J., in giving judgment in the same case in the Exchequer Chamber, L. R. 3 C. P. 594: "We unanimously come to the conclusion that the persons whose duty it was to take precautions were the persons by whom the work was being carried on; and that though the defendants as reasonable persons must have known that girders if negligently handled are likely to fall, they could have no reason to suppose that the persons who were doing the work were doing it so negligently as to hazard the happening of such an event."

Unless it had been made a special cause of complaint that the defendants in the present case had negligently employed unskilful, incompetent and untrustworthy persons as their contractors, it appears to me that a similar observation might have been made here;—though the defendants, as reasonable persons, must have known that fires kindled in dry weather, with a strong wind blowing, and in wood-land, were likely to spread, they could have no reason to suppose that the persons who were doing the work would do it negligently by lighting fires when danger therefrom was most palpable.

The doctrine is by no means new. Lord Denman, C. J., in *Allen v. Hayward*, 7 Q. B. 975, after referring to several previous cases, says: "It seems perfectly clear that in an ordinary case the contractor to do works of this description (improvement of a navigation) is not to be considered as a servant, but a person carrying on an independent business."

And in this particular case the acts charged as negligent appear by the evidence to be those of sub-contractor; and this makes the language of Rolfe, B., in *Reedie v. The London and North Western R. W. Co.*, 4 Ex. at p. 255, especially applicable: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds upon the maxim *Qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should

be responsible for any injury resulting from the want of skill or want of care of the person employed ; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."

In *Hole v. The Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488, the defendants were authorized by an Act of Parliament to construct a swing bridge across a navigable water, and they employed a contractor to do the work, in conformity with the provisions of the Act ; but before the work was finished, the bridge, from some defect of construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river. The Company was held liable. It was urged on their behalf, that the contractor was the party who was answerable ; but the Court held that though the contractor might be liable, the Company certainly was.

Pollock, C. B., rested his judgment on this, p. 498 : "That there is a distinction between mischief which is collateral, and that which directly results from the act which the contractor agreed and was authorized to do."

This case was observed upon by Martin, B., in *Butler v. Hunter*, 7 H. & N. p. 831, thus : "In *Hole v. The Sittingbourne and Sheerness R. W. Co.*, the Company were empowered by Act of Parliament to construct a bridge across a navigable river, and they employed a contractor who did it in such a way as to obstruct the navigation of that river. That was a nuisance caused by the Company." The mischief was, in the act itself which created the nuisance, it was not a collateral mischief.

In *Pickard v. Smith*, 10 C. B. N. S. 470, Williams, J., thus states the law, at p. 480 : "Unquestionably, no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual

act of wrong or negligence, the employer is not answerable.
* * That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor is employed to do."

In our case the act which the defendants contracted to have done for them included the clearing and grading of the land upon which the railway was to be laid. The injury of which the plaintiff complains did not arise from anything which was required by the contract, but from negligence in the mode of executing it. The defendants were in no way parties to this negligence; it is not traceable to them. No doubt they contemplated the use of fire to clear the land, but they neither contemplated nor authorized the use of it negligently.

To the same effect may be considered the cases of *Reedie v. London and North Western R. W. Co.*, 4 Ex. 244; *Knight v. Fox*, 5 Ex. 721; *Overton v. Freeman*, 11 C. B. 867; *Butler v. Hunter*, 7 H. & N. 826.

The case of *Fletcher v. Rylands*, L. R. 3 H. L. 330, decided in the House of Lords in 1868, was considered in the Court below, and has been referred to on the argument in this Court as sustaining the plaintiff's case. It is to be observed that no reference appears to have been made to this case in *Daniel v. Metropolitan R. W. Co.*, L. R. 5 H. L. 45, decided in the House of Lords in 1871. It cannot be supposed that if these two cases involved any common principle or presented any analogy to each other, the earlier in point of date would have been overlooked when the later was discussed and decided. The subject in question in the first was certainly not one likely to have any influence in bringing "the law to its true foundation with regard to the liability of railway companies."

The statement of the principle upon which the judgment was grounded shews that it has no relation to the question raised in the later case, nor yet to the case before us. Blackburn, J., says in *Fletcher v. Rylands*, L. R. 1 Ex. 279: "The true rule of law is, that the person who for his

own purposes brings on his lands *and collects and keeps there* anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape."

The cause of action there arose from the erection of a permanent reservoir by the defendant on his own land for a continuing purpose; the consequence of which was that the water collected in the reservoir, bursting through the subsoil, flooded a colliery of the plaintiff. For this the defendant was held to be liable, though he employed an engineer and contractor; and it appears to me that a comparison of the facts of the two cases shews that they rest on perfectly distinct grounds.

Considering the present case as covered by the judgment in Daniel's case, in which Lord Westbury held that it made no difference whether the contractors, from whose negligence the damage arose, were in the employ of the defendants or not, I am of opinion that the judgment of the Court of Queen's Bench was right, and that the appeal should be dismissed with costs.

RICHARDS, C. J.—I think in this country we ought to adhere to the doctrine laid down by the late Sir John Robinson, in *Dean v. McCarty*, 2 U. C. R. 448, in relation to the kindling of fires for the purpose of clearing land. The principles of that case have been acted on in this country by the Courts for nearly thirty years past. To hold now that when a farmer to clear up his land puts out fire, he is to be considered in the nature of an insurer, would be such an important change in the law that I think it ought to be brought about by the act of the Legislature, and not by the decision of the Courts.

I fear so to hold would offer an insuperable bar to the improving and clearing up of land in many parts of the country.

The setting out of the fire for the purpose of clearing land not being necessarily an improper act, the defendants

cannot be held liable for the negligence of the contractors for which they themselves would not have been liable but for their *negligence*.

MORRISON, J., and GALT, J., concurred.

BLAKE V. C.—In *Fletcher v. Rylands*, L. R. 1 Ex. 265, in the Exchequer Chamber, Mr. Justice Blackburn, who delivered the judgment of that Court, then laid down the law as to the duties and liabilities of owners of land who bring upon it anything likely to do mischief to the adjacent land owners. *The principle of law which governed that case seems to be, that he who does upon his own lands acts which, though lawful in themselves, may become sources of mischief to his neighbours, is, as a general rule, bound to prevent the mischief from occurring, or to make compensation to the persons thereby injured.

At page 279, Mr. Justice Blackburn thus puts the matter placed before the Court for adjudication : “ The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours ; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on the land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from

any latent defect which ordinary prudence and skill could not detect."

And the following is the answer made to this proposition: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded from the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his own peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And, upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench."

Again he says, p. 282: "As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of

the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour; and the case of *Tenant v. Goldwin*, 1 Salk. 360, 2 Ld. Raym. 1089, 6 Mod. 311, is an express authority that the duty is the same, and is to keep them in at his peril."

In the House of Lords, L. R. 3 H. L. 330, Lord Cairns quotes from the judgment which I have cited, and states he entirely concurs in it. Lord Cranworth thinks it lays down the correct rule, and adds, p. 340: "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precaution he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond 421. And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it."

Again, page 342: "The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible."

The rule adopted in that case, which seems a most reasonable one, has thus received the sanction of nine Judges, and must be taken, notwithstanding expressions in other decisions which seem to conflict with it, as that which binds us in disposing of the present case. It is true the learned Judges there in enumerating the causes of damage do not mention specifically fire, but after referring to certain matters which may be injurious, the words are added, "or any other thing which will, if it escapes, naturally do damage." The language is wide enough to include fire as one of the elements of destruction, and it is obvious that it was not intended to exclude this, for in the case of *Jones v. The Festiniog R. W. Co.*, L. R. 3 Q. B. 733, Mr. Justice Blackburn treats *Rylands v. Fletcher* as decisive on the point, although the damage there was caused by fire.

He says, page 736: "I am of opinion that the plaintiff is right, and that the Company, under the circumstances, were liable to make good the damage caused by the sparks from their engine. The general rule of common law is correctly given in *Fletcher v. Rylands*, L. R. 1 Ex. 265, affirmed in the House of Lords, L. R. 3 H. 330, that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage the defendants are liable for the consequences, though no actual negligence be shewn on their part."

This rule of law, thus plainly and distinctly set forth, seems to give the plaintiff a remedy for the injury he has here received. The Legislature, in dealing with the question of liability arising from fire, does not excuse a defendant under circumstances such as the present. It was thought reasonable to make certain exceptions as to the

acts specified in the statute, but when the matter was under the consideration of Parliament, it was not thought proper to go so far as to embrace such a case as that under discussion.

Can we then add another clause to this Act which will so far enlarge it as that it will afford relief in a class of cases not covered by it? or is it not rather for the Legislature, if the requirements of the country are such as to call for such an enactment, to pass one restricting the use of fire to such districts and occasions as may be thought proper, and absolving from liability the party so using it, where no negligence is shewn? Even without such a statute the act in question is not prevented, but the person performing it has presented to him the strongest possible reason for using all the precautionary measures in his power, as the consequences resulting from what is being done will fall on the shoulders of him, who, for his own advantage, has set in motion that which has resulted disastrously.

I think it must be found in favor of plaintiff that he is entitled to damages for the injury which arose to him from setting out this fire, whether it was done negligently or not.

Large powers and privileges are, by the statutes incorporating them, given to railway companies, and I think the Court should be slow to absolve them from the responsibilities naturally flowing from their use.

In the exercise of the powers granted the defendants they enter upon the lands which are to form the line of their railway and proceed with the work of chopping and clearing. It is shewn clearly that in such work as that in question fire is always used to burn the timber. It is the means used to get rid of it.

The defendants without, seemingly, the smallest measure of precaution, light fires at a dry season, and when dangerous to be done, which result in the burning of a considerable amount of property of the plaintiff.

The act was done as negligently as it well could be, and

cannot be justified by those who did it. There can be no doubt, even if necessary to shew negligence, that the plaintiff's case is made out as against the Company, unless they are entitled to protection by the contract under which the work was performed.

I am unable to come to the conclusion that they are. The means whereby the Company performs the part of the work in question are, by entering into a contract with Messrs. Manning and Ginty for its performance; these gentlemen employ a sub-contractor, one Winters, who, in his turn, hands over a part of the work to one Linden.

Now when the Company empowered Messrs. Manning and Ginty to proceed on their land and prepare it as their track, they knew that the ordinary mode of preparing it was by the use of fire at certain stages of the work, in order to consume portions of that which was being removed. In fact Mr. Manning in his evidence says, "The railway could not have been built without burning off the timber."

They therefore empowered the contractor to do that which is, either ordinarily, or always, done in such work, and thus this act of setting out this fire which caused the damage to the plaintiff is the act of the Company, for the liability in respect of which they cannot escape, or rather should not be allowed to escape. This was no collateral matter; on the contrary, it arose in the very matter in respect of which there was the employment; and I think it should be a matter of regret, if a defendant, damnified as is the present one, can be sent from the Company to the contractors, and by them to Mr. Winters, who hands him finally over to Mr. Linden, whom it may not be worth pursuing.

In *Ellis v. Sheffield Gas Consumers' Company*, 2 E. & B. 769, Lord Campbell uses the following language: "Mr. Jones argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing

which he is employed to do, the employer is responsible for that thing as if he did it himself. * * It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." See also *Pickard v. Smith*, 10 C. B. N. S. 470.

In *Hole v. The Sittingbourne & Sheerness R. W. Co.*, 6 H. & N. 488, Pollock, C. B., says, page 495: "A person authorized by Act of Parliament to construct works cannot transfer that authority to another person without being responsible for the proper execution of them." And at pp. 497, 498: "Here the contractor was employed to make a bridge, and he did make a bridge, which obstructed the navigation. The case then falls within the principle laid down in *Ellis v. The Sheffield Gas Co.*, 2 E. & B. 767: 'Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act. * * * But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies. * * So here it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do, what materials he would use, and to have seen that the specification and the materials were such as would ensure the construction of a proper and efficient bridge. But I do not rest my judgment on that ground, but simply on this, that there is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do."

Here, so far from the company making any objection at any time to the use of fire for the purposes of the work, through their resident engineer, they sanction its employment. No doubt a company can fully protect itself by the agreement which it enters into with a contractor, for all damage that may arise in the work for which he has con-

tracted, and thus it may be protected from loss ; but I do not think a company can escape its primary liability where, as here, damage arises to another through the act of its contractor in carrying on the work contracted for, when such work is being done, in the ordinary mode adopted, in carrying out the subject matter contracted for.

It must be remembered that in the suit of *Daniel v. The Metropolitan R. W. Co.*, the accident, the subject of litigation, did not arise from an act done by the railway, or its contractor, or in its construction. The act complained of was done by a corporation over which the company had no control, and the question there decided was, that the company was not, under the circumstances, responsible for the act of the servant of this corporation, although it resulted in injury to a passenger on their railway.

In *Fletcher v. Rylands*, the act complained of was that of a contractor, but the House of Lords did not doubt the liability of the defendant, for whom the work was done.

I think the plaintiff is entitled to succeed so far as the damage occasioned by the first fire is concerned, but that the evidence fails to show the defendants liable for the second fire.

Appeal dismissed.

MICHAELMAS TERM, 38 VICTORIA, 1874.

From November 16th to December 6th.

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

EDMUNDS QUI TAM V. HOEY.

Promissory note—Stamps—Pleading—31 Vic. ch. 9—Action for penalty.

Declaration, that defendant on, &c., became the holder of and a party to a note made by one E., payable to one T., or bearer, &c., which note was made on unstamped paper, and was chargeable with duty under the 31 Vic. ch. 9, before the duty chargeable by the statutes in that behalf had been paid, by affixing thereto the proper stamps in that behalf, and such note then and immediately after the time when defendant became the holder thereof not having thereon or affixed thereto the proper stamps, to the amount of the duty properly chargeable thereon, contrary to the said statute in that behalf; whereby, and by force of the statutes in such case, defendant forfeited \$100.

On motion to arrest judgment, *Held*, declaration good: and that it was unnecessary to negative the payment of double duty by defendant, for defendant's protection, if any, must arise, on the facts stated, under sec. 12 of the 31 Vic., not sec. 11 by which the penalty is imposed, and it must therefore be pleaded.

The 36 Vic. ch. 13, repeals secs. 11 and 12 of 31 Vic. ch. 9, D., and substitutes others therefor: *Quære*, whether these sections should be pleaded as part of the first Act generally, or stating specially that they are so by virtue of the last Act: *Semble*, the latter.

It was objected that the reference here was to the 31 Vic. ch. 9, which was repealed when the alleged cause of action arose; but *Held* sufficient.

Held, also, under the Law Reform Act, 1868, sec. 17, sub-secs. 4 and 5, as amended by the 33 Vic., ch. 71, O., this being a County Court case tried at the Assizes, that the motion to arrest judgment was properly made in this Court.

DECLARATION. First count: that defendant, on the 9th of July, 1873, within this province, purchased and obtained

and became the holder of and party to a promissory note made within the province by one Ebenezer Edmunds, by the name of J. & E. Edmunds, dated 9th April, 1873, whereby J. & E. Edmunds promised to pay to one Robert Twiss or bearer the sum of \$94.25, six months after date, and which note was made on unstamped paper, and was chargeable with duty under the statute of the Parliament of Canada, 31 Vic., ch. 9., and entitled, &c., before the duty chargeable by the statutes in that behalf had been paid, by affixing thereto the proper stamps in that behalf, and such promissory note then, and immediately after the time the defendant became such holder thereof and party thereto, not having thereon or affixed thereto any proper stamp or stamps to the amount of the duty properly chargeable thereon, contrary to the said statute in that behalf; whereby and by force of the statutes in such case made and provided, the defendant then forfeited and became and is liable to pay the sum of \$100, one half thereof to Her Majesty, and the other half thereof to the plaintiff, who sues in this action therefor, as well for Her Majesty as for himself, pursuant to the said statutes on that behalf.

The second count is not material, as the verdict was for the plaintiff only on the first count.

Plea: Never indebted by statutes: 31 Vic., ch. 9, secs. 4, 11, 12, D.; 21 Jac. 1, ch. 4, sec. 4.

Issue: The cause was tried before Richards, C. J., with a jury, at the assizes held at Hamilton last spring, when a verdict was entered for the defendant on the second count, and for the plaintiff on the first count, with \$100 for the penalty or debt.

In Easter Term last *Davidson* obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff on the first count should not be set aside, and a verdict entered for the defendant, pursuant to leave reserved, or why judgment on the first count should not be arrested, on the ground that it disclosed no cause of action against the defendant, in that it only alleged the defendant purchased and obtained, and became the holder of the promissory note

therein mentioned before the duty chargeable thereon had been paid by affixing thereto the proper stamps in that behalf, and such promissory note then and immediately after the time the defendant became such holder thereof or party thereto not having thereon or affixed thereto any proper stamp or stamps to the amount of the duty properly chargeable thereon, contrary to, &c., and did not negative that the defendant paid double duty by affixing a stamp or stamps to the amount thereof, or the amount of double the sum, &c. And on the ground that the first count alleged that the penalty sued for was incurred under 31 Vic., ch. 9, whereas the said Act was not in force, but repealed at the time the alleged cause of action (if any) arose.

In this Term *Mackelcan* shewed cause. There was no leave to move to enter a verdict for the defendant. The defendant must rely only on the motion to arrest the judgment, if the count be insufficient: *France v. White*, 1 Scott's N. R. 604, 1 M. & G. 731; 1 *Arch. Pr.* 12th ed., 1555. The motion to arrest judgment should not have been made in this Court, because it is a County Court suit. The 32 Vic., ch. 6, sec. 5, O, applies to motions respecting verdicts and nonsuits.

The 33 Vic., ch. 13 repealed sections 11 and 12 of the 31 Vic., ch. 9, and re-enacted them with amendments. It was not necessary the provisoes should have been negatived: *Rex v. Pemberton*, 2 Burr. 1035; *Metcalfe v. Shaw*, 3 Camp. 22; *Rex v. Banks*, 1 Esp. 144. The count has not referred to the statute correctly. The reference should have been to the later of the above two Acts, and not to the earliest of them; but it would have been sufficient to have referred to the statute in that behalf, without mentioning the year and chapter. The erroneous part may be rejected as surplusage: *Bell v. McKindsey*, 3 E. & A. 1; *O'Reilly q. t. v. Allan*, 11 U. C. R. 411; 1 *Chitty's Statutes*, 51-55. The Court may amend the count against all the objections: *Arch. Pr.*, 12th ed., 1561; *Wynne v.*

Middleton, 1 Wils. 125; *Anonymous*, 1 Wils. 256; *Bennet q. t. v. Smith*, 1 Burr. 402; *Richards q. t. v. Brown*, 1 Dougl. 115; *Baldwin q. t. v. Henderson*, 4 U. C. R. 361; *Beasley q. t. v. Cahill*, 2 U. C. R. 320; *Bank of Montreal v. Reynolds*, 24 U. C. R. 381. See also *Potter's Dwaris' Statutes*, 190.

Davidson supported the rule. This motion to arrest the judgment is made "in respect of the verdict," according to the language of 32 Vic., ch. 6, sec. 5, O. The authorities shew that when the exception is in the same section as the one which gives the action, the exception must be negatived by the plaintiff. The 11th section of 33 Vic., ch. 13, O., contains both the right to sue and the exception proviso: *Spieres v. Parker*, 1 T. R. 141; *Rex v. Jukes*, 8 T. R. 542; *Wells v. Iggulden*, 5 D. & R. 20; 1 *Bac. Abr.* 81; *Gill v. Scrivens*, 7 T. R. 27.

The reference made to the statute is objectionable, because the statute, so far as it ever was applicable to the action, had been repealed before the action was brought, and before the cause of action had accrued, and it was as if it had never been passed: 1 *Bac. Abr.* 74; *Platt v. Hill*, 1 Lord Raym. 381; *Lane v. Bennett*, 1 M. & W. 70.

WILSON, J., delivered the judgment of the Court.

The count states that the promissory note was made on unstamped paper, and was chargeable with a duty under the statute passed in the 31st Vic., ch. 9, entitled, "An Act to impose duties on promissory notes and bills of exchange" before the duty chargeable by the statutes in that behalf had been paid; and that the duty was not paid, contrary to the *said* statute in that behalf, whereby, and by force of the statutes in such case made and provided, the defendant forfeited, &c.

The duty was payable only under the 31 Vic., ch. 9, and it is said not to have been paid, contrary to the said statute. So far that is right, for the reference is to the statute just specially named, and that is the Act which imposes the duty, and requires it to be paid.

At most the penalty accrued by the 33 Vic., ch. 13, which repealed the 11th and 12th sections of the first Act, and re-enacted them with amendments. And the count concluded rightly by alleging that an action arose by virtue of the statutes in that behalf.

Whether the 11th and 12th sections should be pleaded as a part of the first Act generally, or a part of it stating specially that they are so by virtue of the later Act, may not be quite clear. I am disposed to think in the latter way : *Rex v. Morgan*, 2 Str. 1066 ; *Allan v. Great Western R. W. Co.*, 33 U. C. R. 483 ; *Scott v. Great Western R. W. Co.*, 23 C. P. 182 ; *Drake q. t. v. Preston* 34 U. C. R. 257.

As to not negating the exceptions or provisoes of the statutes, the 11th sec. of the Act says : " If any person in Canada * * becomes a party to, or pays any promissory note * * chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid * * such party shall thereby incur a penalty of \$100 and save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid * * * But no party to, or holder of any such instrument, shall incur any penalty by reason of the duty thereon not having been paid at the proper time, and by the proper party or parties, provided at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time, and by the proper party or parties, and that he pays the double or additional duty as in the next section provided as soon as he acquires such knowledge."

This count shews the note was made on unstamped paper, and that the defendant became a party to and holder of it before the duty chargeable had been paid by affixing thereto the proper stamps, and the note then, and immediately after the time the defendant became the holder and party thereto, not having thereon or affixed thereto any proper stamp or stamps to the amount of the duty properly chargeable thereon, contrary to the statute, whereby, &c.

It appears the note paper was unstamped, but not that no stamps were attached to it, only that it had not any proper stamps affixed to it.

If no stamps were attached to the note when the defendant took it, he might put on double stamps when he did take it, under the 12th section. In that case, the matter of defence being under a separate section from that one which gives the cause of action, is one which must be set up by the defendant, and is not required to be negatived by the plaintiff.

The 11th section provides that if any person become a party to, &c., a note, &c., chargeable with duty *before* the duty or double duty is paid, he shall be liable to the penalty.

If the defendant became a party to this note, which is payable to bearer, by taking it merely as a bearer or holder, and I think it does shew that fact, then the count shews he took it before the duty was paid on it.

And if the count shew, as I think it does, that there were not attached to the note at the time the defendant took it, or immediately after it, any proper stamps to the amount of the duty properly chargeable upon it, then it appears the defendant's case could not fall within this latter part of the 11th section.

In that way no part of the defendant's protection, contained in the 11th section, can be, from the statements in the count, within any part of the cause of action alleged against him. His protection may be quite consistent with the facts set forth in the count, but that protection arises by the 12th section only, in which case it is for the defendant to aver and prove it, and not for the plaintiff to negative or exclude it.

In *Simpson v. Ready*, 12 M. & W. 736. 740, Parke, B., said, an exception, "whether it occurs in a subsequent part of the Act, or in a subsequent part of the same section containing the enactment, it must come as an answer, and as part of the defence."

And Aldersen, B., said: "There is a manifest distinction

between a proviso and an exception. If an exception occurs in the description of the offence in the statute, the exception must be negatived, or the party will not be brought within the description. But if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."

See, also, *Thibault q. t. v. Gibson*, 12 M. & W. 88; *Stennel v. Hogg*, 1 Wms. Saund. 262, *a*.

This objection fails.

It is not necessary to consider the point raised by way of a preliminary objection to the defendant's rule, that the motion in arrest of judgment should have been in the County Court, where the cause is pending, and not in this Court. But as the point is of some consequence, it may be as well to intimate what our opinion is upon it.

The Law Reform Act, 1868, ch. 6, sec. 17, sub-secs. 4 and 5, as amended by the one of 1869, ch. 7, sec. 8, and secs. 1-5 of the later Act, contain the legislation necessary to be considered.

Any motion to be made in respect to any nonsuit, verdict or assessment, in any County Court cause, had, tried, or assessed at the Assizes, shall be made, heard, and determined in one of the Superior Courts of Law at Toronto, according to the practice of that Court, and any rule or order made therein shall be valid and binding.

On a motion to arrest judgment the Court may refuse to grant it, and award a *venire de novo* or a repleader: *Ch. Arch. Pr.*, 12th ed., 1550.

So a new trial cannot be moved for after a motion to arrest judgment, for the latter proceeding affirms the verdict. The motion should be made at the same time, for a new trial, or to arrest the judgment: *ibid* 1534.

That practice shows the motion to arrest the judgment is a motion "in respect of" a nonsuit, verdict, or assessment,

if the verdict is to be vacated, and if a *venire de novo* or repleader may be awarded.

When a rule for judgment was necessary, the motion for a new trial was of course always made after that rule was granted: 1 *Sellon's* Pr. 497.

If the rule for judgment were still required, it would have to be granted by the Superior Court, where the record was, in the case of a County Court cause which had been tried at the Assizes, because it is in the Superior Court that the verdict must be moved against.

When the plaintiff moved his rule for judgment, the defendant moved to arrest the judgment, that is, that judgment be stayed until the Court be moved on behalf of the plaintiff, and shall otherwise order; and the plaintiff had then to move to discharge that rule: 1 *Sellon's* Pr. 497.

Although the formal judgment is pronounced in such a case by the County Court, there is nothing inconsistent in asking the Court which has actual seisin of the record to stay the judgment until the plaintiff shew cause to the contrary; because the Court which has the record may deal further with the cause by a repleader or *venire de novo*, which involves of necessity a further trial of the cause before the Court of Assize.

On the whole case, we are of opinion that the rule should be discharged.

Rule discharged.

REGINA V. DENHAM.

Sale of liquor without license—Druggist—Conviction.

A conviction of defendant, who was a registered druggist, made before the 37 Vic. ch. 32, O., for selling spirituous and intoxicating liquors by retail, to wit, one bottle of brandy to one O. S. at and for the price of \$1.25, without having a license so to do as by law required; the said spirituous and intoxicating liquor being so sold for other than strictly medical purposes only: *Held*, valid, for he was not, as a druggist, authorized to sell without license, and it was unnecessary to shew that he was not licensed, or to negative any exemptions or exceptions.

Semble, that selling a bottle of brandy is selling by retail.

In Michaelmas Term last *Osler* obtained a rule *nisi* to quash a conviction before John L. Wilson and George Moncrieff, Justices of the Peace, on the 5th August, 1873, "for that he, the said George Denham, unlawfully did sell spirituous and intoxicating liquor by retail, to wit, one bottle of brandy to one Oliver Simmons, at and for the price of \$1.25, without having a license so to do, as by law required, the said spirituous and intoxicating liquor being so sold for other than for strictly medical purposes, and contrary to the statute," which said conviction has been returned and filed, the same being illegal and void, on the grounds :—

1. That it does not shew that the said George Denham was licensed to sell liquor in a tavern, store, or other place where liquors are allowed by law to be sold.

2. That the said conviction is for selling intoxicating liquor without the license therefor by law required, and the defendant was shewn to have been a registered chemist and druggist under the Pharmacy Act of 1871, and as such required no license to sell intoxicating liquors for medical purposes.

3. That it does not appear from the said conviction that the sale of intoxicating liquor, in respect of which the said conviction is made, was a sale by retail, it not appearing or being alleged what quantity the said defendant sold.

4. That the said conviction does not shew for the want of what license the said conviction was made, or that

defendant was guilty of any offence which entitled the said Justices to make the conviction.

5. That the said conviction does not state or negative all the exemptions or exceptions.

In Easter Term *M. C. Cameron*, Q. C., shewed cause. The defendant was properly convicted under 32 Vic., ch. 32, sec. 22, O: "Any person who shall sell spirituous, fermented or intoxicating liquors of any kind, without the license therefor by law required, shall," &c. Here the defendant was proved to have sold spirituous liquors, and it was his duty to shew he had the license: *Re Barrett*, 28 U. C. R. 559. 36 Vic., ch. 34, sec. 1, O, merely shews that druggists would not be liable to be fined for having spirituous liquors in their possession.

Osler, contra. The Acts of 32 Vic., ch. 32, O., and 27-28 Vic., ch. 18, sec. 12, with the exception as to druggists in 36 Vic., ch. 34, O, shew that it was intended that for medical purposes druggists should be allowed to sell.

RICHARDS, C. J., delivered the judgment of the Court.

At first I thought it might be necessary to ascertain what selling of spirituous liquors by retail meant in 32 Vic., ch. 32, sec. 1, O. On looking at the Imperial Stat., 14 Geo. III., ch. 88, sec. 5, I see reference is made to granting licenses in the Province of Quebec for *retailing* wine, brandy, or other spirituous liquors.

In the Upper Canadian statute of 37 Geo. III., ch. 11, I find reference to provisions in an Act of Parliament having expired, so far as they extended to persons retailing spirituous liquors, and in less quantities than three gallons, but not keeping a house of public entertainment.

I find, also, in the statute of Canada, 27-28 Vic., ch. 18, sec. 12:—

3. "Provided always, that any licensed distiller or brewer, having his distillery or brewery within such county, * * may thereat expose and keep for sale such liquor as he shall have manufactured thereat, * * and may sell the same

thereat, in quantities of not less than five gallons at any one time," &c., and bottled ale and porter in quantities of not less than a dozen bottles.

4. Any merchant or trader having his store * * * within such municipality may keep thereat for sale, and sell intoxicating liquors in quantities not less than five gallons, or in case of bottled wine, ale, or porter, one dozen bottles of at least three half-pints each.

I do not deem it necessary to pursue this inquiry further, for I find the first section of 32 Vic., ch. 32, O., as amended by 33 Vic., ch. 28, sec. 1, O., reads thus: "No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors within the Province of Ontario, without first having obtained a license authorizing him so to do as hereinafter provided. Provided always, that nothing in this Act contained shall prevent brewers and distillers, duly licensed by the Government of Canada, from selling by wholesale only spirituous, fermented, or manufactured liquors in casks or vessels, containing not less than five gallons each."

The evidence undoubtedly shews that the defendant, on the occasion referred to, sold spirituous liquor, whether the sale was wholesale or retail, and it was without a license, for the defendant did not pretend he had any license.

The defence, as I understand it, rests entirely on the ground that defendant being a druggist duly registered under the Pharmacy Act of 1871, and selling the spirituous liquors referred to for strictly medical purposes only, is not liable to punishment under the statute. Or, in other words, druggists, at the time of the committing of the alleged offence, were permitted to sell spirituous liquors for strictly medical purposes without a license.

They are not brought within the exception contained in the latter part of the first section of 32-33 Vic., ch. 32, as amended; and the clause already quoted, is, "that *no person* shall sell by wholesale or retail without first having obtained a license."

Reference was made to the statute of Canada, 27-28

Vic., ch. 18, which authorizes the municipalities, under certain circumstances, to prohibit the sale of intoxicating liquors, and the issue of licenses therefor within the municipality. Sec. 12 provides, that *as long as a by-law* for that purpose "*continues in force, no person, unless it be for exclusively medicinal or sacramental purposes, or for bonâ fide use in some art, trade or manufacture, or as hereinafter authorized,*" * * * shall sell any spirituous or other intoxicating liquor."

The effect of this provision, as I understand it, is, that in those municipalities where a by-law prohibiting the sale of intoxicating liquors is in force, persons selling such liquors for exclusively medicinal or sacramental purposes are not liable to the penalties thereby imposed. This provision cannot apply here, for it is not pretended that any prohibitory by-law had been passed by the municipality.

Reference has also been made to sec. 23 of 32 Vic., ch. 32, O., which provides, that in those places where intoxicating liquors may be allowed to be sold by wholesale or retail, "no sale shall be permitted from 7 o'clock on Saturday night, till 6 o'clock on Monday morning thereafter, save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a Justice of the Peace, is produced by the vendee or his agent. This certainly does not authorize an unlicensed person to sell, but prohibits licensed persons from selling between certain days and hours.

The last reference is to 36 Vic., ch. 34, sec. 1, O, which prohibits persons from keeping or having in any house, shop, &c., any spirituous liquors, for the purpose of selling therein, unless duly licensed thereto. But that provision was not to apply to brewers or distillers duly licensed by the Government of Canada, nor to any "chemist or druggist duly registered as such, under and by virtue of the 'Pharmacy Act of 1871,' who keeps or has such liquors for strictly medical purposes only."

This merely refers to the keeping of liquor for the purposes of *selling*. The exception of druggists does not

authorize them to sell, but merely "to keep and have such liquors for strictly medical purposes only."

The provincial statute of last session, 37 Vic., ch. 32, passed since the conviction in this case was made: "To amend and consolidate the law for the sale of fermented or spirituous liquors," settles the question now in dispute from the time that Act came into force.

The 24th section forbids the sale, by wholesale or retail, of spirituous liquors by any person without first having obtained a license under that Act, authorizing him so to do.

Sec. 25 forbids any person keeping or having such liquors in any house, &c., for the purpose of selling, unless duly licensed under the provisions of that Act.

Then sec. 27 declares that secs. 24 and 25 "shall not prevent any chemist or druggist duly registered as such, under and by virtue of the 'Pharmacy Act of 1871,' from keeping, having or *selling* liquors for strictly medicinal purposes, and then only in packages of not more than twelve ounces at any one time, except under certificate from a registered medical practitioner."

If any inference is to be drawn from the Act of the Legislature in this respect, it would not be one favourable to the defendant.

Taking the objections as they appear in the rule, I fail to see how it was necessary to shew that the defendant was not licensed to sell liquor. The charge against him was that he sold spirituous liquors without the license therefor by law required, contrary to the statute in such case. It was for him to shew he was licensed, and he failed to do so.

The second objection is, that as a registered druggist he required no license. I think the law is not so. There is nothing that I can see in any of the statutes then in force, authorizing druggists to sell intoxicating liquors as such, whether for medicinal or other purposes. But here the magistrates decide, in fact, as I understand, that it was not bought for medical purposes, nor did they think the evidence shewed it was so sold. We could not, on this point, quash the conviction for want of evidence, even

though we thought the law did authorize druggists to sell for strictly medicinal purposes.

3. As to the quantity sold, I have not taken any trouble to ascertain if selling a bottle of brandy is selling by retail. I should say it was (*a*). Selling a bottle of brandy for \$1.25 can hardly be considered doing a very large wholesale business. I do not see that the conviction can be affected by its being alleged that it was sold for other than strictly medicinal purposes, or how that can do any harm.

4. The conviction shews that it was for selling spirituous and intoxicating liquor by retail, to wit: one bottle of brandy to one Oliver Simmons, at and for the price of one dollar and twenty-five cents, *without having a license so to do*, as by law required, the said spirituous and intoxicating liquor being so sold for other than strictly medical purposes only, contrary to the statute. It seems to refer to the want of a license so to do, to wit, to sell by retail.

5. I do not see what exemptions or exceptions could well be inserted in the conviction as to selling this bottle of brandy by retail without a license.

On the whole, we see no ground for quashing the conviction, and the rule must be discharged with costs.

Rule discharged with costs.

(a) See *Gorsuch v. Butterfield*, 2 Wis. 237, on this point.—REP.

BROWN AND MANN V. THE CORPORATION OF THE TOWN OF
LINDSAY.

*Sale of goods by sample—Purchase by committee of corporation—Acceptance
—Want of corporate seal.*

The corporation of a town appointed a committee, consisting of the reeve and two others, to purchase 1,500 feet of hose for the use of the water works. They called for tenders, and the two plaintiffs, of whom the reeve was one, submitted a sample of hose, on which the other two members of the committee gave the plaintiffs the order. The hose was tested when it arrived, and was the same as the sample, but it was useless for the purpose required.

Held, that the corporation, on the evidence, more fully set out in the case, had not accepted the hose absolutely, but conditionally only, to keep it if they found it to answer: that they were not liable for it as being bound by the conduct of the committee, for want of an agreement under the corporate seal; and that such contract, being executed, might also be avoided because one of the plaintiffs was a member of the committee.

DECLARATION, on the common counts.

Pleas: Never indebted, and payment.

The cause was tried at Lindsay, before Morrison, J., without a jury, at the last Fall Assizes.

The plaintiffs claimed for 1,050 feet canvas

hose, 40c.....	\$420 00
13 pairs coupling, delivered, at \$6	78 00
And 6 pairs coupling bargained and sold, at \$6	36 00
	<hr/>
	\$534 00

The evidence given was to the following effect:—

On the 1st December, 1873, the town council passed a resolution that the Mayor, Reeve, and Mr. Morrison, be a committee, and be authorized to purchase 1,500 feet of hose for the use of the water works.

On the 19th January, 1874, another resolution was passed, that the bill of Brown & Mann for hose be referred back to the finance committee to report on; also, that the balance of the finance report be now passed.

On the 2nd February another resolution was passed, that the committee on fire and water be instructed to arrange with Brown & Mann in regard to canvas hose, and have the same returned, as it is useless to the town.

On the 16th February, another resolution was passed, that the committee on fire and water be instructed to purchase 1,000 feet of English canvas hose at once, such as the sample now furnished the council, and that the price do not exceed 35 cents per foot, with guarantee as to quality and strength, and return the hose furnished by Brown & Mann at once.

Mr. *Dobson* was the Mayor named in the first resolution, and Brown, one of the plaintiffs, was the Reeve named in it. Mr. Morrison was another member of the council.

John Dobson stated that he was the Mayor in 1873. The committee appointed called for tenders from the plaintiffs and from the other persons. There were samples sent up from Montreal to the plaintiffs. Brown did not act on the committee in deciding on the hose; it was left entirely to Mr. Morrison, who was an old fireman. Only one sample of hose was sent. Mr. Morrison and I gave the order to plaintiffs for the hose, as the sample was considered a splendid piece of hose, and we gave the order to plaintiffs for 1,500 feet and the requisite coupling. The hose came here, and was delivered to the town.

Cross-examination :

I was not a judge of hose, but relying on Mr. Morrison's judgment I concurred with him. Plaintiffs sent in a tender to me as chairman, about the 9th or 10th of December, and immediately after the opening of the tender we gave the order to plaintiffs to provide the hose. We did not communicate with the council before giving the order, as we considered the resolution did not require we should do so. The hose was tested when it arrived. I have no doubt the hose sent up was the same as the sample with the tender. When it was tried the hose was not what we expected it would turn out. I was present at the first trial. Mr. Morrison tested it. We told Brown we were disappointed in it, but I understood after the trial it would come all right.

Malcolm Morrison said he was a member of council, and head of the fire department in Lindsay for some years, and

was employed in the fire department in Montreal for some years : I knew nothing of canvas hose at the time ; it was about a quarter of the price of other hose. (Looks at sample produced by the preceding witness.) It may be the same. I know the hose delivered was the same as the sample. The hose is used in Montreal. I was once there since and got 50 feet from them—that is, from the people who supplied the plaintiffs with the hose in question. It is just the same as plaintiffs provided. We were advised by Waterous & Co. of Brantford, to get this hose. We gave an order to plaintiffs for it, and they supplied it. I believe the hose to be the same as the sample. The hose was cut to the lengths we ordered. Plaintiffs supplied couplings for it ; they were made to suit our hydrants by our order. They were all right.

Cross-examination : The hose came about New Year's. It was tested but once, but it was not fitted for the purpose then. On the first trial of canvas hose it did not answer, but it was not fit for fire purposes. We tried a short piece of the hose, the water passed through and it answered better. Canvas hose always leaks at first. We took the hose to the engine house from plaintiffs. The couplings were attached.

James Mann, one of the plaintiffs, said : The hose and couplings were taken from our store to the fire company's. I saw the hose tested ; it did not answer. We offered the corporation to guarantee a new canvas hose if they would take it from us.

For the defence. *Mr. Fee*, a member of the council, said he saw the hose tested ; it was useless. The water could not be forced to the end of the 1,500 feet. Afterwards 50 feet were steeped in oil and tried. The pressure drove the oil and water through the hose.

John C. McLaren : I live in Montreal. I supplied the hose to the plaintiffs. I afterwards offered to supply and guarantee hose that would answer, and to take the hose back if they would give me a new order for such other hose. This hose was in use before it was sold

to plaintiffs. I have known the hose for twenty years. I believe we wrote to plaintiffs we would take back the hose if they would pay the freight and the cost of putting on the couplings.

Cross-examination. We only buy from agents in England. I have sold to several parties this kind of hose; only had complaints from one other purchaser besides this case.

In reply, *Brown*, the plaintiff, said, I offered the corporation the same terms that McLaren offered to us, to take back the hose and guarantee the new hose.

The defendants' counsel moved for a nonsuit, because the defendants could not depute their power to a committee to contract for the purchase of such an article: that the defendants had never adopted the purchase so made, nor accepted the hose: that there was no such delivery to the council of the hose as to bind them; and that one of the plaintiffs having been a member of the council at the time of the alleged contract and delivery, the contract was void.

The verdict was entered for the plaintiffs, and the damages assessed at \$534, with leave to the defendants to move to enter a nonsuit; and with leave to the plaintiffs to move to enter a verdict for any amount the Court might think them entitled to.

In this Term, *Armour*, Q.C., obtained a rule *nisi* calling on the plaintiffs to shew cause why a nonsuit should not be entered pursuant to the leave reserved.

Hector Cameron, Q. C., shewed cause. The defendants, whether they can depute the committee or not to act for them, are liable because they accepted the goods which the committee bought. The defendants may be bound in such a case although they do not contract under seal. There is plain evidence that the defendants accepted and received the goods, and it is proved the goods furnished agreed with the sample upon which they were to be supplied: *Sanders v. The Guardians of the St. Neot's Union*, 8 Q. B. 810; *Clarke v. The Guardians of the Cuckfield*

Union, 21 L. J. Q. B. 349 ; *Nicholson v. The Guardians of the Bradfield Union*, L. R. 1 Q. B. 620 ; *Brice on Ultra Vires*, 329.

Armour, Q. C., supported the rule. Committees of the council have no power to buy goods ; the power of the corporation must be exercised by the council : Municipal Act of 1873, sec. 7. ; and the council must act in the purchase of any property, real or personal, by by-law : *Ib.* sec. 372 and sub-sec. 1 ; unless when it is otherwise expressly provided for : sec. 222 : see also *Frend v. Dennett*, 4 C. B. N. S. 576. The council cannot delegate its power to a committee even by a by-law, but here there was no by-law. But if a committee can act so as to bind the council, it only can be when it performs the duty it was entrusted with. This committee was appointed to purchase hose for the use of the water works. The hose it is admitted on the part of the plaintiffs is not fit for the water works. It cannot be said, if the committee accepted of such an article as that which the plaintiffs gave, that they have acted within the power given to them.

A different rule applies to trading corporations from that which governs municipal bodies : *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, affirmed in Ex. Ch., L. R. 4 C. P. 617 ; *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91 in Ex. Ch. ; *Mayor, &c., of Kidderminster v. Hardwick*, L. R. 9 Ex. 13 ; *The Governor and Company of the Copper Miners of England v. Fox*, 16 Q. B. 229. The plaintiffs cannot recover in this action against the defendants, because Brown, one of the plaintiffs, was at the time of the contract and of the alleged delivery of the hose a member of the council, and one of the committee appointed to purchase : Municipal Act, 1873, sec. 327 ; *Corporation of the Town of Peterborough v. Burnham*, 12 C. P. 103 ; *Collins v. Swindle*, 6 Grant 282 ; *Kerr on Fraud*, 102 ; *Fox v. Macreth*, 1 White & Tudor's L. C., 4th ed., 115.

WILSON, J., delivered the judgment of the Court.

The evidence shews that the hose supplied agreed with the sample. It also shews it was not fit for fire purposes.

It did not answer. It was useless, and the committee were "disappointed," and it "was not what we expected it would turn out." That is the evidence of both sides.

The testing of the hose could have been of no use as connected with the contract if the agreement were to buy by sample. Why the testing was made does not appear—whether it was made for the mere purpose of satisfying the defendants that the hose they had bought was a good article, or to enable them to say whether they would or would not accept it.

If it were made for the latter purpose, the testing it and the taking possession of it to test it will not be an acceptance or receipt of the hose by the defendants.

If it were for the former purpose, then the defendants must have accepted and actually received it. In that case, the contract being executed, the defendants must be answerable in law although the contract was not under seal.

If, however, the defendants did not accept and receive the hose, and the contract was not executed, they cannot be liable for the claim in question, because the contract was not made under seal.

It is a matter of fact in what respect the defendants acted when they sent for, tested, and sent the hose after to their engine house.

The inference we draw from the facts is, that they did not by their acts after the hose arrived in town accept and receive it as the completion and fulfilment of the engagement of the committee, but that they had it only to test it, and took it conditionally, to keep it if they found it to answer.

That is not what the plaintiffs thought or meant, but we think it is what the defendants did and meant.

They wanted "a hose for the use of the water works;" they perhaps knew nothing of the engagement of the committee to take a hose which would agree with a sample, whether it was fit for the water works or not; and if they did know it, they intended no doubt to take it only if it were fit for the water works.

On this point of fact we think the defendants did not accept the hose absolutely, but conditionally only.

The defendants cannot be made liable then by reason of any unqualified acceptance of the hose, and upon the ground of there being an executed contract. If they are liable it must be because the engagement of the committee is binding upon them.

The committee did in fact make a bargain to take a kind of hose which should correspond with the sample, and such a hose was in truth supplied; the very article they bargained for was brought to the town and tested; and if their act is binding on the defendants the defendants are liable, liable either on a contract executed or on a contract executory for not accepting the goods.

They are not in our opinion liable on a contract executed for the reasons before given, and they are not liable as an executory contract, because they did not bind themselves by seal.

It is not denied by the defendants that the old rule of law as to the necessity of a seal in contracts is relaxed to suit modern necessities, so far as trading corporations are concerned, while dealing within the scope and for the purpose of their incorporation; and it cannot, we think, be denied that other than trading corporations are bound by contracts executed, although these contracts were entered into not by the corporate seal.

But it is denied by the defendants that such other corporations—a municipal body, as the defendants are—can be or are bound by contracts which are not executed in any other manner than by the corporate seal, unless in those few cases of frequent occurrence and small value, which may be all reduced to the cases of necessity which were allowed as exceptions under the old law. We have lately held in this Court in the case of *Brown v. Corporation of the Town of Belleville*, 30 U. C. R. 373, that contracts which were executed, such as the purchase of a dredge, which the corporation had accepted and used and retained, are binding on municipal bodies; and *Pim v. The Municipal*

Council of Ontario, 9 C. P. 304, is a decision in appeal to the same effect.

But we think the law has been carried no further either in England or in this country.

The three cases cited by the plaintiffs shew in each that it was based upon an executed consideration.

The case of the *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13, determined that a contract not executed under the seal of the plaintiffs, nor executed by any person who was authorized by the corporate seal to represent them, which related to the letting of tolls, could not be enforced against the defendant, as there was no mutuality in the contract, the plaintiffs themselves for the want of a seal not being bound.

It was held also that the payment of a deposit by way of a month's rent in advance, was not such a part performance as to entitle the plaintiff to a specific performance—it was merely conditional and provisional; and that, as the defendants had never got possession, the contract was still executory.

It was considered also that the giving of the key of the toll house was a delivery of possession, and so the contract was executed; but it appeared the key was given to the defendant against the directions of the town clerk, and it was said the defendant did not take the key as part performance of the contract.

The case of *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91, cited by the defendants, is also expressly applicable on the point; and there *The Mayor, &c., of the Borough of Ludlow v. Charlton*, 6 M. & W. 815, is as to municipal corporations and other than trading bodies strictly maintained.

If the committee appointed to buy had accepted the hose, so that it could be said their act was the act of the corporation, the defendants would be liable. There is no evidence that they did accept it. The act of acceptance need not be affirmed by the corporate seal. The testing was apparently a preliminary proceeding to the acceptance, although it may be the plaintiffs had nothing to do with the testing.

The acts of the committee are not entitled to be pressed too much against the defendants, because of the fact of Brown, one of the members of it and representing the council, being in the incompatible position of both buyer and seller.

The plaintiffs have failed to prove a completely executed contract with the defendants, and they cannot recover on the common counts.

The contract, such as it is, is executory only, and is not enforceable for the want of the corporate seal. There would be no use, therefore, to amend the declaration.

Being executory, it may also be avoided on the ground of one of the plaintiffs, who was a trustee for the defendants, acting as vendor in opposition to the interest of the defendants.

The claim as to the hose failing, the claim for the couplings fails also.

The verdict, in our opinion, should be set aside, and a nonsuit entered.

Rule absolute.

REGINA V. SMITH.

Conviction—Right of appeal—Amending conviction.

The appellant was convicted before the police magistrate of a city for keeping a house of ill-fame, "contrary to a certain by-law of the corporation." She appealed to the sessions, in May following, where it was held that under 32 33 Vic. ch. 32, D., the decision of the magistrates was final. The appellant, on the 2nd of June, applied to this Court for a mandamus to the Sessions to hear the appeal, and the Police Magistrate on the same day filed with the Clerk of the Peace another conviction, stating the offence to be "contrary to the statute in such case made and provided," 32 Vic. ch. 32, under which there is no appeal.

Held, that the appeal should have been heard; and that after notice of appeal given and the time of hearing the appeal had arrived, no amendment could be made to the conviction. The mandamus was therefore ordered.

THE appellant was convicted before Alexander McNabb, Esq., Police Magistrate of the City of Toronto, on the 6th of March, 1874, "for that she did on the 19th day of February, 1874, at the City of Toronto, keep and maintain a certain house of ill-fame, on Edward street, in the City of Toronto, contrary to a certain By-law of the corporation of the City of Toronto, passed on the twentieth day of October in the year of our Lord one thousand eight hundred and sixty eight, entitled a by-law to restrain and punish vagrants and other disorderly persons."

He adjudged the defendant to pay \$50 and the costs, and if not paid forthwith to be levied by distress and sale of the defendant's goods, and in default of distress to be imprisoned for three months in the common gaol, unless the said several sums and all costs were sooner paid.

The defendant appealed to the next General Sessions of the Peace, held in the month of May, and on the case being brought before the Court, the County Attorney contended that the statute 32-33 Vic. ch. 32, gave no right of appeal or took away the same in cases of this nature, and that the decision of the Police Magistrate was final.

The learned chairman of the Quarter Sessions decided that the appellant had no right of appeal, and refused to allow the appeal to be proceeded with or heard, and

made an order as follows: "Conviction confirmed, with costs."

Dated 13th May, 1874."

(Signed) JOHN BOYD.

On the 2nd June *Warmoll* obtained a rule *nisi* calling on the respondent in the appeal case in the Court below, and the Chairman of the General Sessions of the Peace, to shew cause why a writ of mandamus should not issue directed to the said chairman, commanding him to hear the appeal of the said appellant against the conviction by Alexander McNabb, Esq., of her, the appellant, on the 6th March.

Fenton shewed cause, and filed his own affidavit, stating that he had been informed by the Police Magistrate, who made the conviction sought to be appealed against, that the conviction was informal and defective, in stating the same to have been made under a By-law of the City of Toronto, the same having been made under the statutes of Canada of 1869, ch. 32; that he was aware of the magistrate desiring to amend the same, and he prepared and returned to the proper officer the said conviction, amended under the said chapter 32, as appeared by the copy thereof certified by the clerk of the peace, annexed to his affidavit. This affidavit was made on the 6th June.

By the amended conviction the information was, that the defendant was charged with keeping and maintaining a house of ill-fame on Edward street, *contrary to the statute in such case made and provided*. The clerk of the peace of the County of York certified that it was a correct copy of the conviction of Ann Smith, as filed in his office on the 2nd June, 1874.

Under 32 Vic., ch. 32, secs. 15 and 17, D., the Police Magistrate's decision was final, and it was an offence under the statute, and there was no appeal. The Police Magistrate had a right and it was proper for him to file another conviction, it being in accordance with the facts: *Selwood v. Mount*, 9 C. & P. 75; *Chaney v. Payne*, 1 Q. B. 712, and

the cases there cited: *Charter v. Graeme et al.*, 13 Q. B. 214.

Warmoll contra. The defendant has a right to appeal under the Consol. Stat. U. C. ch. 114, this conviction being for a violation of a by-law of a municipality, and not a crime. The form of the conviction is that set forth in the schedule appended to 27 Vic., ch. 18, C., as applicable to convictions for violating municipal by-laws. This is the only conviction that was before the Quarter Sessions, the amended conviction having been only filed with the clerk of the peace since this rule was granted, and therefore it could have been no ground for refusing to hear the appeal.

RICHARDS, C. J., delivered the judgment of the Court.

We think this rule must be made absolute. There was nothing before the General Sessions inconsistent with the defendant's right to appeal. The matter now presented in the form of an amended conviction had not then arisen. If it is brought before the Court they may then consider it.

In *Chaney v. Payne*, 1 Q. B. at p. 722, Lord Denman, C. J., refers to several cases which establish clearly that magistrates are not bound by the conviction first drawn up, whether it be merely the note of the conviction or drawn up in a more formal manner as the conviction itself, but that they are at liberty, when called upon by appeal to return the conviction to the Quarter Sessions, or by *certiorari* into this Court, to draw up and return a more formal conviction correcting any errors which may have existed in the one first drawn up; provided the latter conviction be according to the truth and the facts of the case as proved before the magistrates."

Further on in his judgment he says, p. 724, 725, "and possibly it may be competent to the magistrates, even after such return of an informal conviction, to return another formal one, before any motion is made to quash the conviction, or appeal heard. But it can hardly be contended that, after a conviction has been removed by *certiorari* and quashed by

this Court, or by the Sessions on appeal, any other conviction can be effectually drawn up."

The copy of the information put in does not exactly charge the offence as it is stated in the conviction filed on the 2nd June.

In the information it charges defendant with being "the keeper of a house of ill-fame on Edward street in the said city, a place of resort for both men and women of lewd character for purposes of prostitution, the same being contrary to law." In the conviction it is that she did "at Edward street, in the City of Toronto, keep and maintain a certain house of ill-fame, contrary to the statute in such case made and provided."

In the information actually laid there does not appear the formal reference to the offence as being *contra formam statuti*. Which conviction appears most to accord with the truth and facts of the case as they appeared before the Police Magistrate?

The statute 32-33 Vic. ch. 32, sec. 2, sub-sec. 6, D., refers to persons charged with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame, or bawdy house, as being of the class of offenders who may be tried in a summary way before a competent magistrate without a jury.

Under sec. 15 of the same Act the jurisdiction of the magistrate in case of any person charged with the offence mentioned in sub-sec. 6 is absolute, and does not depend on the consent of the party charged to be tried by such magistrate, nor is such party to be asked whether he consents to be so tried, and the section concludes as follows: "Nor shall this Act affect the absolute summary jurisdiction given to any justice or justices of the peace in any case, by any other Act."

Under sec. 17, in the case of a person summarily tried (amongst others) under sub-sec. 6 of sec. 2 of the Act, if the magistrate find the charge proved he may convict the person charged, and:

1. Commit him to the common gaol or other place of con-

finement, there to be imprisoned with or without hard labor, not exceeding six months, or

2. May condemn him to pay a fine not exceeding, with costs in the case, \$100, or

3. To both fine and imprisonment, not exceeding the said period and sum, and such fine may be levied by warrant of distress, or

4. The party convicted may be condemned (in addition to any other imprisonment on the same conviction) to be committed to the common jail or other place of confinement for a further period not exceeding six months, unless such fine be sooner paid.

The conviction filed on the 2nd June does not seem to comply with the statute, nor is it in form like that appended to the statute, being more like the form of conviction for violation of the provisions of municipal by-laws already noted.

The conviction in this respect however accords more with the provisions of the Municipal Act 29-30 Vic. ch. 51, sec. 246 sub-sec. 68, which authorizes a fine of \$50 for a breach of the city by-law, and for by-laws for suppressing houses of ill-fame, in case of no distress found and non-payment of fine and costs, imprisonment not exceeding six months. The Municipal Act of 1864 sec. 372, sub-secs. 11 and 13, is to the same effect.

If the conviction took place for a breach of the municipal by-law, and that was the only conviction before the Court, it seems to me the Court were wrong in not hearing the appeal, and that the mandamus must go directing them to do so.

As to filing an amended conviction, the practice, as we understand it, in moving to quash a conviction is this. When the conviction is returned it is filed. Up to the time of return and filing the justices may amend the conviction, but after the filing of the papers no amendments can be made. By analogy, after notice of appeal is given and the time for hearing the appeal has arrived, we should say no amendment could then be made to the conviction after the proceedings in appeal have been entered on before the Court.

We do not, in the view we take, see how the amended conviction can now be of any service to the parties.

We think therefore the mandamus should go, and that the Court below should be directed to enter the proper continuances, and hear the appeal.

Rule absolute.

FAIRBANKS V. THE GREAT WESTERN RAILWAY COMPANY.

Railway company—Highway—Open culvert—Accident—Liability.

The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured.

Held, that the company were liable; for their duty was to restore the highway to its former state, or in a sufficient manner not to impair its usefulness; and, in substituting this open culvert, which they could readily have covered, for the former ditch, they had unnecessarily made it more dangerous.

Quære, whether the corporation were bound to repair this part of the highway; but, *Held*, that if so, that would not relieve the defendants.

DECLARATION: That defendants wrongfully, improperly, and negligently made, dug, and constructed a certain culvert near the centre of a public highway in the town of Chatham, at the crossing known as the Gravel Road Crossing, and wrongfully and negligently permitted it to remain in the said highway, and by reason thereof the plaintiff, whilst he was lawfully passing along said highway, using ordinary care, fell into the said culvert, and broke his leg and otherwise injured his person, whereby he suffered great pain, and incurred expense for surgical and medical attendance, and was prevented from attending to his work and business.

Pleas: Not guilty by stat., 16 Vic. ch. 99, sec. 10, Public Act.

The cause was tried before Morrison, J., and a jury, at the last Spring Assizes, held at Chatham.

It appeared from the evidence that many years before the railway was built a gravel road was constructed in the town of Chatham, which had open drains on each side of what was the travelled roadway, and that there was a space between the ditches and the extreme east and west lines of the road. Near the place in question this space was not used as a sidewalk, but that portion which was nearest the town was made use of for a sidewalk. When the railway was built it crossed the road at right angles from east to west, and the ditch on the side was built up with square timber so that it was on a level with the road bed of the railway, and it was an open space about seven or eight feet wide, and four or five feet deep across the track. It was in on the line of the road about twenty-five feet, and a few feet in on the gravel part of the road.

Before reaching the railway the ditches on either side sloped down from the level of the road, but at the railway the wooden culvert was built up square and was of the size mentioned. The sidewalk on the west side of the gravel road did not extend to the railway, but only to a point near a wicket which opened into the station grounds, some little distance from the railway track.

The culvert, which was a continuation of the open ditch, was open on the top. It was at the top in three compartments, and across the second, from east to west, was laid a plank over which people walking on the railway track crossed the culvert.

The plaintiff's account of the transaction was, that on the night of the 28th of September, 1873, about half-past eight, the night being dark and rainy, he left defendants' station in Chatham, and walked out to the wicket gate on the gravel road, intending to go into the town; but, the night being dark and rainy, he concluded he would go to his brother's house, which was on the south side of the track. The sidewalk did not extend south to the track; he went on to the gravel and turned south to cross the track, keeping on the west side of the carriage road, and when he came to the crossing he slipped into the

culvert or cattle guard; it was a square pit built up square of timber and across the track about five feet deep. He stepped into it—did not see it—and broke his leg in two places. He was helped out, and carried to a hotel, and afterwards taken to his brother's house; he was confined to his room four or five months; was still walking on crutches, and one leg was shorter than the other, and would always be so. He said on cross-examination he did not come down the railway track and cross the culvert. He could not tell whether he crossed any of the rails before he fell, or on which side of the (railway) track he fell in; he was facing the south when he fell.

In passing along the gravel road from the wicket to the culvert on the railway, the plaintiff must have diverged towards the culvert when he fell in. Evidence was given of the plaintiff's occupation as a butcher and buyer of cattle; the estimate of his profits being about \$50 a month.

The plaintiff was questioned as to whether he had been drinking that day, but he denied having drank more than once, and that was in the morning.

Some of defendants' employees were called, who supposed he had fallen in by endeavoring to cross the culvert, on the plank referred to. One of these witnesses said the plaintiff had told him about four or five weeks before the trial that he was stepping on to the plank from the stringer and he fell in. On cross-examination this witness said he saw plaintiff in the market and was conversing with him, and asked him how he fell in. Plaintiff said he was stepping on to the stringer and he dropped in; he told him he tried to step from the one to the other, and he dropped in.

On the 18th of September the Clerk of the Corporation of the town of Chatham wrote to defendants' General Superintendent notifying the Company to remove the fence enclosing their grounds at Chatham, which was some three or four feet upon the street along the south side of the gravel road, between the entrance of the railway grounds and the track. The Corporation were about to lay

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a sidewalk along that portion of the street, which required that the fence should be moved back. He also called attention to a very dangerous place in the street at the same point, in the shape of a *cattle-pass*, which the Board of Works required to be filled up. This referred to the place in question, where the plaintiff fell in.

On the 19th September the Superintendent wrote that the letter of the 18th would be attended to by the Company's Engineering Department.

After the accident there was a box drain carried under the railway, and the opening where the culvert had been was filled up. The defendants' engineer said the culvert was not intended as a cattle-guard, because, if a cattle-guard, it would have been within the Company's grounds. The difference between the culvert and the ditch made for the gravel road was that the former was made with timber and not all earth-work.

Several witnesses for defendants said they thought there was no danger of persons passing along the road from this culvert, as the road was as wide there as at any other part.

The learned Judge told the jury it was for them to say whether the defendants were negligent in leaving the crossing in the state mentioned by the plaintiff's witnesses; and whether the plaintiff fell in, using ordinary care in crossing the place, and they believed his testimony as to the accident. He told them the defendants had a right to cross the ditch with their railway: that the mere fact of making the portion so crossed better to pass the water freely was not an act of negligence, as long as they did not enlarge it and extend it into the highway. If they were of opinion that the plaintiff, as suggested, walked down the railway and crossed over the plank, they should find for defendants. The defendants' counsel objected that the plaintiff had no right to recover, as they had a right to build the culvert as they did. The learned Judge thought they had no right to encroach on the road allowance.

The jury found for the plaintiff, damages \$2000.

In Easter Term *M. C. Cameron*, Q.C., obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, and for excessive damages, and for misdirection of the learned Judge, in telling the jury it was for them to say if there was negligence in the construction of the culvert, when the learned Judge should have told them there was no evidence of negligence on the part of the defendants, the culvert when built being necessary to carry off the water in connection with the ditch or drain at the side of the road, and not impairing the usefulness of the highway which it crossed.

In this term *C. Robinson*, Q.C., shewed cause. The damages are not excessive. The plaintiff was a butcher, in good business, earning \$50 a month. His leg was broken in two places. He was kept in bed for four months, and continued to require crutches at the time of the trial, six months after the accident. One of his legs was permanently shortened, and his medical expenses were heavy. This case is free, also, from any contradictory medical testimony. The defendants are clearly responsible for the accident, though the town may also be so: *Shearman and Redfield* on Negligence, 3rd ed., secs. 446, 447, 452; *Judson v. New York and New Haven R. W. Co.*, 29 Conn. 434; *Brine v. Great Western R. W. Co.*, 2 B. & S. 402; *Redfield* on Railways, vol. i., 537, 538, 540; *Moshier v. Utica and Schenectady R. W. Co.*, 8 Barb. 427. The highway extends all across: *Tutill v. West Ham Local Board of Health*, L. R. 8 C. P. 447; *Regina v. United Kingdom Electric Telegraph Co. (Limited)*, 31 L. J. Mag. Cas. 166; *Angell* on Highways, 2nd ed., secs. 237, 240, 260, 262; *Regina v. Great Western R. W. Co.*, 21 U. C. R. 555; *Vinal v. Inhabitants of Dorchester*, 7 Gray 421.

M. C. Cameron, Q.C., supported the rule. The evidence was not satisfactory as to the account of the accident given by the plaintiff. The evidence on behalf of the defendants shews that the plaintiff was walking on the railway track at the time of the accident. The road was, in fact, restored to its former state of usefulness. What was done

did not narrow the track or sidewalk ; it was a continuation of the ditch, and the Corporation must have accepted it as the ditch. Usefulness means *current* use ; they are not to obstruct so as to prevent its being used as it was formerly. The Corporation having put in a box drain the culvert was no longer necessary, and for this reason it was done away with after the accident. The case of *Soule v. Great Western Railway*, 21 C. P. 308, shews that where the Company are authorized to do the act complained of, though a party may be injured, there is no remedy against the Company.

Whitmarsh v. The Grand Trunk R. W., 7 C. P. 373, shews that when the work which was done by the Company had been so carelessly done that an injury was sustained by plaintiff, yet the remedy was only against the Road Company, and not against the Railway. Here the Corporation of the town were bound to keep the road in repair, and they were the parties liable, if any, and not the defendants.

RICHARDS, C.J., delivered the judgment of the Court.

We have looked at the authorities cited by Mr. Cameron, and at such of those cited by Mr. Robinson as we could conveniently refer to, and we have come to the conclusion that we can not interfere with the verdict of the jury.

The case of *Whitmarsh v. The Grand Trunk R. W.*, 7 C. P. 373, as we understand it, decides that the Company may raise or lower the road which they cross, so as to make the crossing conform to the height above the road crossed, according to the provisions of the statute : that as to the proper protecting of the sides of the embankment by a fence, that what the Railway Company did was with the sanction and virtually as the servant of the Plank Road Company, and if that was not properly done, and the plaintiff was injured in consequence, his remedy was against the Road Company.

Here, however, there is nothing to shew that the railway built their culvert or cattle-guard, as some of the witnesses call it, by the authority or with the sanction of the Cor-

poration. The letter sent to the defendants, some ten days before the accident, shews that at that time they were complaining of the dangerous state of the culvert, which was undoubtedly built by defendants.

In the case of *Soule v. The Grand Trunk Railway*, 21 C. P. 308, it was held that when the defendants were required to place sign-boards across a road-crossing, the planting of posts for that purpose on the road could not be considered such a nuisance as to make them responsible for an injury caused by running against one of these posts.

Here, however, the defendants could undoubtedly have continued the drain across the road without leaving the top open. Their own station-master said, in giving his evidence, there would have been no difficulty in covering it.

If the object of the defendants was to use this opening across the road for a cattle-guard, then they certainly may be fairly said not to have restored the road to its former usefulness, nor to have taken any means to prevent those who might use the Gravel Road from falling into the cattle-guard. The road there originally sloped from the roadway to a ditch, probably a gradual slope, so that persons passing along the side of the road, even if they fell into the ditch, would fall but a short distance, and on a soft material. But here, instead of an open ditch, they would fall into a hole, with walls of timber about seven feet square, and five feet deep, much more likely to produce injury than if the road had been in its former state, and certainly to that extent it did impair its usefulness.

As already remarked, there would have been no difficulty in covering over this culvert, and from the evidence the jury could hardly infer that the drain was seven feet wide at the bottom before the defendants took possession of that part of the road.

It seems very much as if they found that the top of the ditch, from the side of the road to the roadway, was about seven feet wide, and they put in the timber culvert that width perpendicular, making it necessary, when the bed of the railway was laid, to raise up this culvert to the height

of five feet. It had its three subdivisions, and probably, without any covering, answered as a cattle-guard. The raising this up brought it further in on the line of the Gravel Road track, some of the witnesses say two or three feet, and to this extent that part of the road was diminished in width, and no means, apparently, taken to prevent accidents. I understand defendants' engineer to say that it was not intended as a *cattle-guard*, because, if a *cattle-guard*, it would have been within the Company's grounds. All that may have been quite true, and yet this may have been allowed to remain in that way because it answered the place of a *cattle-guard*.

I think the jury might well say that the defendants had improperly and negligently, and, if for the purposes of a *cattle-guard*, wrongfully constructed the culvert in the highway, whereby plaintiff was injured.

Even if the Corporation of Chatham were bound to repair this part of the highway, though as to that we express no opinion, we do not think it follows that the plaintiff may not maintain an action against defendants for their wrongful act. They were authorized to cross this highway provided they restored it to its former state, or in a sufficient manner not to impair its usefulness. It is not pretended it was restored to its former state.

They could have covered over this aperture, seven feet wide and five feet deep, over this portion of the road across their line, or could, in some other manner, have restored the road in a sufficient manner not to have impaired its usefulness.

We think the evidence given sufficient to justify the jury in finding they had not done this when the accident happened.

The evidence shewed the open space had been entirely filled in since the accident, and no such complaint can again be urged. The only objection made to the charge of the learned Judge was, that he should have told the jury the defendants had a right to build the culvert as they did. We do not think he should so have directed the jury.

The effect of the charge to the jury, as we understand it, was to say whether the defendants were guilty of negligence and want of care in constructing and leaving the crossing in the way they did, which, of course, would imply the question as to its having been restored to its former state, or in a sufficient manner not to impair its usefulness.

If the defendants' counsel had asked the learned Judge to leave this question to the jury in the words of the statute, and if he had refused, he might have complained; but he (the Judge) could not direct, as the defendants' counsel requested, that the defendants had a right to build the culvert as they did.

We do not suppose the Railway Company were bound to make the road which they crossed better than it was before, but they surely have not a right, under pretence of making a culvert to carry off water, to convert that which was formerly a harmless ditch into a trap, into which people would be likely to fall and break their limbs.

On the whole, as to this point of the case, we do not think there was any substantial misdirection, or that the finding of the jury was wrong.

As to the accident itself, the jury believed the plaintiff's account of it, and we cannot say that the evidence shews they were not justified in believing him. They had the opportunity of hearing the witnesses, and the finding is not against evidence. If they had found the other way we probably would not have disturbed the verdict, and if a new trial were granted, it is very probable the verdict would be against the Company. The doctrine seems well established that when a man suffers a particular injury by a nuisance he may maintain an action, the injury being direct and not consequential. See *Co. Litt* 56 (a), where some of the illustrations are given. A good many cases are referred to in *Marriott v. Stanley*, 1 M. & G. 568, and notes. *Ridley v. Lamb*, 10 U. C. R. 354, was against a defendant who had left his waggon in the highway.

As to the damages, the plaintiff's injury was of a very serious character. He suffered considerable physical pain;

was confined to his room for several months; was obliged to go about on crutches; one of his legs will be permanently shortened, and for some considerable time he will suffer more or less inconvenience from his injuries. The evidence shews he was making about \$50 a month from his business, and a considerable sum was paid for the doctor's bill.

On the whole, we cannot say the damages, \$2,000, are so excessive as to justify our setting aside the verdict on that ground.

Rule discharged.

DUNCAN V. SMART.

Insolvent Act of 1869—Trader.

A banker, and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks:

Held, a trader within the Insolvent Act of 1869.

APPEAL from the judgment of the County Court of the county of Middlesex dismissing a petition of the defendant to the County Judge of Middlesex to set aside an attachment in insolvency issued against him.

The petition sought to set aside the attachment on the ground that the defendant was not a trader within the meaning of the Insolvent Act of 1869, and that his estate was therefore not subject to compulsory liquidation.

It appeared that the defendant was "a banker and exchange and money broker," and in the course of his business bought and sold American silver coin, American currency or greenbacks, and foreign and uncurrent coin and money, also drafts and bills of exchange upon New York, and stocks of building societies, and that he also drew drafts on New York and sold the same.

Bartram for the appellant. For a definition of a banker and broker, see *Bouvier's Law Dict.*, 10th ed., Titles "Banker," "Broker," "Trader." This appellant does not deal in merchandise, and is in no sense a trader. He also

referred to *Richardson v. Bradshaw*, 1 Atk. 128; *Harman v. Clarkson*, 22 C. P. 291; *Re Cleland*, L. R. 2 Ch. 466.

W. P. R. Street, contra. It makes no difference by what name an occupation is called; if it involve trading, it is a trade. Here the insolvent bought and sold American silver, for instance, which is a dutiable merchandise under the tariffs of 1867 and 1868. He referred to *Chitty* on Bills, 10th ed., 459; *Hankey v. Jones*, Cowp. 745.

WILSON, J., delivered the judgment of the Court.

The question is, whether "a banker and exchange and money broker, and a dealer in foreign and uncurrent money and buying and selling stocks," is a trader within the meaning of the Insolvent Act?

The learned Judge of the County Court decided he was, and we are of opinion he decided rightly.

In *Hankey v. Jones*, Cowp. 745, Lord Mansfield considered drawing and redrawing bills of exchange, making the profit of exchange on such business, was merchandizing and a trading, within the statutes, 13 Eliz. ch. 7 and 21, Jac. 1 ch. 19.

The case of *Re Cleland*, L. R. 2 Ch. 466, from 473 to 477, supports this view.

The word *traders* alone is used in our Act. That term must be understood and interpreted by its meaning at the present day, as the limits of trade have been so much extended beyond what they were in former times.

Deer in an enclosed ground were formerly not distrainable for rent, but the rule is now otherwise. "The nature of things is now very much altered": *Davies v. Powell*, Willes 46.

It was formerly held that *hops* were not a victual within the statute of Ed. VI. ch. 14, passed against regrators, but were a noxious weed.

"But times went on, and things changed; what was formerly considered as poisonous is now become a common necessary of life": *Hicking v. Waddington*, 1 East 143, 156.

Printing and publishing a newspaper is trading: *Pinkerton*, q. t. v. *Ross*, 33 U. C. R. 508.

The appeal will be dismissed with costs, payable out of estate.

Appeal dismissed.

FARR V. THE GREAT WESTERN RAILWAY COMPANY.

R. W. Co.—Delay in carriage and neglect to deliver goods—Special conditions—Liability.

The plaintiff delivered to the defendants, at Stony Point, 86 hogs, and on the following day he put on board the same car, at Thamesville, on the way, 20 more hogs, to be carried to Guelph. He got at Stony Point a drover's pass to pass him in charge of his stock. The agent there said that he allowed the plaintiff to label the car "Thamesville," on condition that the plaintiff would see the label changed, and that if it had been labelled "Guelph" it would not have stopped at Thamesville at all. The plaintiff went as far as Thamesville with the hogs, and from thence went on by express. By some error the car went round by Hamilton; a delay of several days occurred by which the hogs were injured, and several died; and when the car reached Guelph nine were missing altogether. The jury found that they were lost after leaving Thamesville, but how they could not say. Upon the shipping bill, as well as upon the plaintiff's pass, was endorsed a condition that upon a free pass being given, defendants would not be responsible for any negligence, default, or misconduct, gross, culpable, or otherwise, on the part of defendants or their servants, or of any other person causing or tending to cause the death, injury or detention of the goods.

Held, that the condition protected the defendants, for it sufficiently appeared that the loss must have happened from some cause within it; and *Quære*, whether it was not a reasonable condition, the pass being given to enable the plaintiff to accompany and take care of the stock.

Held, also, that the plaintiff was to blame for not having the proper label put on at Thamesville, and for not remaining himself or sending some one with the hogs.

The declaration alleged as a breach of defendants' contract the non-delivery within a reasonable time. *Held*, that under this the plaintiff might have recovered for the hogs lost and not delivered at all.

APPEAL from the County Court of the County of Wellington.

The second count of the declaration stated that in consideration the plaintiff would deliver to the defendants certain goods to be carried from Stony Point to Guelph, and there delivered, for the plaintiff, for reward to the defendants, the plaintiff did deliver the said goods to the defendants to be so carried and *to be so delivered to the*

plaintiff, under certain terms and conditions, and that the defendants received the same for the purpose and the terms aforesaid; but they did not carry and deliver the goods for the plaintiff as aforesaid within a reasonable time, in consequence whereof the plaintiff lost a portion of the goods, and lost the profit he would have made by reason thereof; and was also put to great expense and trouble in replacing the same, and in tracing up, searching for, and recovering another portion of the goods, and he lost the profit to be made therefrom, and the same were diminished in value.

Plea, not guilty.

2. Denying that the plaintiff delivered to the defendants the goods upon the terms and conditions and for the purposes alleged.

3. That the goods were delivered by the plaintiff and were received by the defendants, to be carried upon a special contract, and subject to the following conditions:—That the plaintiff undertook all risk of loss, injury or damage, and other contingencies in loading, unloading, conveyance and otherwise, whether arising from the negligence, default, or misconduct, criminal or otherwise, on the part of the defendants, their servants, agents or officers; and that they the defendants did not undertake to forward the animals by any particular train or any specified hour, neither were the defendants responsible for the delivery of the said hogs within any certain time or for any particular market; and that, upon a free pass being given to the plaintiff the defendants should not be responsible for any negligence, default or misconduct, gross, culpable, or otherwise on the part of the defendants, their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury, or detention of the said hogs; and that, at the time of the making of the special contract, the defendants did give to the plaintiff a free pass, and that the loss and injury of and to the said hogs were a loss and injury within the true intent and meaning of the said conditions, and were and are part of the loss and damage so agreed to be borne by the plaintiff and for which it was

agreed the defendants should not be responsible, and not any other loss, injury, or damage.

Issue :

At the trial it was stated that the plaintiff claimed for the loss of nine hogs out of 106 which were delivered to the defendants at Stony Creek and Thamesville to be carried to Guelph; and that sixteen died, and some of the others were greatly injured by reason of their having been sent to Hamilton, and there detained for a time, and then sent on to Guelph, and not having been sufficiently protected from the cold or fed during that time.

The evidence was that the plaintiff put 86 hogs on board a car of the defendants at Stony Point on Thursday, the 8th of January, and on Friday he put 20 more in the same car at Thamesville, directed to him at Guelph; and he got at Stony Creek a drover's pass to pass him "in charge of his stock." He said he did not know how the car was labelled when it went to Thamesville. He did not look at the label.

The agent at Stony Point said he objected to give the receipt for the total number of hogs, some of which were not to be put on the car till it reached Thamesville. (He did so, however.) He gave the plaintiff leave to have the car labelled "Thamesville" on condition that the plaintiff would see it changed. The agent so directed the car, and the plaintiff saw it. If the car had been labelled "Guelph" it would not have stopped at Thamesville at all. The special conditions were upon what was called the shipping bill as well as upon the drover's pass. The shipping bill stated that the live stock was to be carried from Stony Point to Guelph. The plaintiff went on to Thamesville with the hogs on Thursday, and added the 20 hogs on Friday morning. The Station Master there said that the plaintiff said he, the Station Master, had nothing to do with the hogs, that he had arranged the matter with the agent at Stony Point. The Station Master at Thamesville said also he saw no label on the car, nothing was there said of labels, and that he did not change it. The plaintiff then went by express

to Guelph. The hogs started from Thamesville two hours before the plaintiff left by express, and they should have got to Guelph on Friday night or on Saturday morning.

The plaintiff got notice from the Station Master at Guelph on Saturday that the hogs had arrived there. He went for them and found they had not arrived. He understood the car had gone round by Hamilton. They did not arrive at Guelph till the following Monday night. There was no objection to the plaintiff taking the hogs that night. On the Tuesday morning he refused to take them in the state they were in. He took them on the Friday after, the 16th of January. The defendants fed the hogs at Guelph. The plaintiff got only 97 at Guelph.

The car with the hogs was in Hamilton on Saturday morning, the 10th of January, by seven o'clock. There was no invoice or bill with the car. At Hamilton the defendants telegraphed to their agent at Stony Point, and he answered that the car was for Guelph.

The pigs were driven out of the car at Hamilton on the Saturday night into a pen, the number made was 99.

They were sent forward from Hamilton to Guelph on the Monday morning, the 12th of January. On Saturday and Sunday the defendants fed the pigs three times; gave them in all five bushels of corn. The feeding at Hamilton and Guelph by the defendants cost \$21.47.

There was a good deal of evidence given by defendants to shew that the doors of the car were well secured, and had not been opened between Thamesville and Hamilton, and between Hamilton and Guelph, and that none escaped at Hamilton or at Guelph, and so that the plaintiff could not have had 106 pigs at any time in the car.

The learned Judge having refused to nonsuit the plaintiff, left it to the jury to say how many hogs were delivered to the defendants, and how many were delivered to the plaintiff at Guelph, and what the value of any not delivered was.

The jury were told the plaintiff was entitled to recover unless the loss of those which were not delivered happened under circumstances which were within the conditions in

question, which relieve the defendants from liability—that is, negligence of servants, &c., and that it did not appear how the loss occurred.

The jury were asked to find the amount of damage sustained by the remainder of the hogs in consequence of the delay by their being sent to Hamilton, &c.; and the plaintiff had leave to enter a verdict for this part of the claim, or to increase the verdict if it should appear the loss was not one from which the conditions protected the defendants.

The jury were also asked to say what the cause was of the car going on to Hamilton. Did it arise from the omission to fulfil an agreement of the plaintiff to change the ticket on the car at Thamesville for Guelph?

The defendants' counsel objected that the plaintiff, having taken a pass, and not having looked after the destination of the car, contributed by his neglect to the loss, if any, and that the jury should have been told so.

The jury found that the plaintiff did agree to see that the ticket was changed at Thamesville, but that there was no evidence from which they could find that any omission to attend to that was the cause of the car being sent to Hamilton: that nine pigs were not delivered to the plaintiff: that some were lost between Thamesville and Hamilton, and some after, but how they could not say; and they assessed the damages at \$100 for the pigs not delivered, and \$45 for damage done to the pigs which were delivered.

The defendants' counsel, in the following Term, obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendants, on the ground that the finding of the jury entitled the defendants to a verdict, or why a new trial should not be granted, on the following grounds: that there was misdirection in telling the jury to find a verdict for the plaintiff, unless the defendants satisfied them that the loss happened in consequence of something provided against by the conditions endorsed on the shipping bill, and that such direction was calculated to mislead the

jury into the belief that the conditions did not protect the defendants against all loss, injury, and damage in any manner whatever, and however arising; and in telling the jury that if more pigs were lost to find a verdict for their value for the plaintiff; or for want of direction, in not telling the jury that, according to the evidence, the plaintiff undertook all risk of loss and damage, and that the verdict on the evidence should be for the defendants; or in not telling the jury that if the car containing the pigs was misdirected to Hamilton by negligence of the defendants' servants, that was negligence for which the defendants were not liable upon the conditions, and if it were misdirected owing to the negligence of the plaintiff, he could not recover; and further that he could not recover, as there was no damage shewn to have arisen from delay; or why the verdict should not be set aside because it is contrary to evidence and the weight of evidence, or because the damages were excessive, or because no damage was shewn to have been caused by delay, or unreasonable delay.

The learned Judge, after argument and on disposing of the rule, said: "It was contended, and so ruled, that the damage to the hogs from the delay (on account of exposure and want of food), although the defendants were not liable for under the terms of the contract. It was different with respect to the actual non-delivery of the nine hogs: that the manner or the cause of their not being delivered was not explained, and that the question remained for the jury to say how they were lost, whether on account of the negligence of the defendants' servants and officers or otherwise, within the conditions which relieved the defendants from their liability for the non-performance of their contract. There was no objection made at any time during the progress of the case that the declaration did not cover the claim for loss occasioned by the non-delivery of part of the hogs."

The learned Judge refused to enter a verdict for the defendants, because no leave was reserved, and the trial was before the late Act came into operation; and he decided

that the plaintiff, in the second count, was claiming only for a non-delivery within a reasonable time, and not for a total and perpetual delivery, and to extend the count to such a case would require an amendment.

The learned Judge, after observing upon the fact that the plaintiff's failure to have the label of the car changed on its arrival at Thamesville, which he had engaged to do, was the cause or probable cause of its going astray to Hamilton, and how the missing hogs might have been lost, and stating that the mistake of the car going to Hamilton would not account for the loss of the hogs, said: "The conditions are drawn strongly in favor of the Company, but I cannot bring myself to hold that the defendants can contract to carry and deliver goods at a station on their line and rest for their defence in an action for a breach of duty for not delivering on the fact that they failed to fulfil it. I understand that it is still contended for the plaintiff that the second count is sufficient as it is to enable him to recover for the value of the pigs not delivered. I am still of opinion that the defendants are entitled to be relieved of the verdict against them on the pleadings as they are, and that the plaintiff should have an opportunity of amending his declaration so as to cover the loss he now complains of, that is, the actual non-delivery of the nine hogs, and the plaintiff is allowed to move in Chambers to amend."

The plaintiff appealed on the following grounds:—

1. That the verdict ought not to be disturbed, because the case was fairly left to the jury on the evidence, with a charge which correctly laid down the law, and the verdict is warranted by the evidence.

2 and 3. The breach in the second count should if necessary have been amended, without granting a new trial, to suit the real question at issue, upon which both parties relied at the trial and upon which the case was tried.

4. The alleged undertaking of the plaintiff to see to the redirection of the car at Thamesville should not enter into the question of the granting of a new trial, because the contract relied upon by both plaintiff and defendants was

in writing, and could not be varied or modified by oral evidence; and further, the jury found that they could not say the omission of the plaintiff to redirect the car caused the loss; and at most it could only affect one branch of the plaintiff's claim, namely, the damage sustained to the hogs which were delivered, and it could not relieve the defendants from their obligation to deliver to the plaintiff at some time the whole of his goods or account for them in some way that would, under their conditions, relieve them from the obligation; and also that the question is not raised by the pleas.

The appeal was argued during this term.

Guthrie for the plaintiff, the appellant. The onus of proof lay on the defendants to shew how the nine hogs were lost, so that it might appear whether the loss had happened in a manner which would be a protection to them under their conditions; and in the absence of such proof the plaintiff would be entitled to recover for the total loss and non-delivery of the nine hogs, because the defendants had engaged to re-deliver the hogs, and they had never done so. He contended also that the second count was sufficient as it was to enable the plaintiff to recover for the non-delivery of these hogs, and at any rate the count, either at the trial or on the argument in term, should have been amended to meet the case which both parties tried, and believed, and treated, was covered by the second count. He referred to *Raphael v. Pickford*, 5 M. & G. 551; *VanNatter v. The Buffalo and Lake Huron Railway Co.*, 27 U. C. R. 581, 588; *King v. Shepherd*, 3 Story's Rep. 349.

Barker, contra. The second count does not enable the plaintiff to recover for a total loss. It is expressly confined to a non-delivery within a reasonable time, which excluded a perpetual non-delivery or total loss, and so it was, as it stood, a case plainly within the conditions which were pleaded in bar. But if that were not so, if the count were sufficient for the plaintiff's purpose as it was, the defendants were still entitled to succeed, because the conditions were an answer to a total loss of the property as well as to the mere temporary delay in delivering it.

WILSON, J., delivered the judgment of the Court.

As to the question of pleading, the case of *Raphael v. Pickford*, 5 M. & G. 551, cited by Mr. Guthrie, shews that a count alleging the defendants' duty to deliver within a reasonable time, will be supported if it appear the promise or duty was to deliver generally, and although the evidence shewed that the defendants had never delivered at all, "the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon a promise or duty to deliver generally": Per Tindal, C. J., at p. 558.

A plaintiff who alleges a total loss in insurance may recover for a partial loss: *Benson v. Chapman*, 8 C. B. 950, 965; *Gardiner v. Croasdale*, 2 Burr. 904.

The count is quite sufficient as it stands, and it will maintain a right to recover either for a total failure to deliver, or for not delivering within a reasonable time.

The amendment in the case, if it had been necessary to amend, might no doubt have been made at the trial or in term, but it can scarcely be contended that it should have been made when the counsel for the plaintiff did not require it, but maintained he did not require it, and that the count was sufficient as it stood.

The learned Judge was therefore quite right, from the view he took of the pleadings, in setting the verdict aside.

The rule having been made absolute for a new trial, the defendants say they are now at liberty to maintain that rule upon any ground whatever which they took in the Court below, although they may not be able to support it on the ground upon which the learned Judge acted; and we think they may do so. That course necessitates the enquiry whether the plaintiff is entitled to recover at all as against the conditions relied upon, and pleaded, and proved by the defendants.

It is of no great consequence in this action whether the burden of proof is or was upon the plaintiff, or on the defendants, to shew the loss happened in a manner which would be within the conditions, or in a manner which

would be without the conditions, because the jury have found the loss was between Thamesville and Hamilton, and subsequent also to the arrival at Hamilton, although they could not say by what means the loss happened; and it sufficiently appears the loss must have happened through "negligence, default, or misconduct, gross, culpable, or otherwise, on the part of the defendants, or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury, or detention of the said hogs."

If this contract had been declared on under the former law, the plaintiff would have been obliged to have averred that the loss of which he complained did not happen by any of the acts or matters provided against in the conditions, and the defendants could have traversed that allegation.

In effect the plaintiff has made that averment in his count in the amended form provided for in the Common Law Procedure Act. The defendants, therefore, after setting out the conditions to inform the Court what they are, have traversed the plaintiff's allegation, by alleging that the loss was one within the meaning of the conditions, on which issue is joined.

The plaintiff must establish his case by showing a loss out of or not protected by the conditions. That his averment is in the negative does not matter if the affirmative is substantially upon him. The terms are a part of his contract: *Shaw v. York and North Midland R. W. Co.*, 13 Q. B. 347.

A landlord who sues his tenant for not repairing must prove that averment: *Soward v. Leggatt*, 7 C. & P. 613, and many other cases which are referred to in *Taylor on Ev.*, 6th ed., sec. 338, p. 372.

What we have now to deal with is, whether upon the evidence the loss, as it was found, was one which, in its circumstances, fell within the protection or provisions of the conditions on which the hogs were carried?

The contract, in effect, amounts to a complete immunity to the defendants. But the plaintiff was, as the learned Judge has strongly pointed out, much to blame in getting

the car specially directed to Thamesville to suit his own convenience, while the way-bill shewed it was directed to Guelph, the agent of the defendants yielding to the plaintiff's solicitation so to address it upon condition that when the plaintiff got to Thamesville he would see that the address was altered to Guelph. The jury have found that the neglect of the plaintiff to have the proper label put on the car at Thamesville was not the cause of the loss of the pigs, but it was unquestionably the cause of the car not going direct to Guelph.

The plaintiff was also to blame for not remaining, according to the terms of his pass, "in charge of" (his) "live stock," or of putting some one else in his place. If he had done one or the other no such misfortune would, in all probability, have happened.

It may fairly be said he has contributed to his own loss. The defence in that form cannot be gone into on the pleadings, for, although not guilty has been pleaded, the second count is in contract and not in tort.

The fact of the drover's pass having been given, and its effect, the defendants have got the full benefit of in their special plea as an answer to the claim made against them on their contract.

The learned Judge was of opinion the defendants could not bargain for a total exemption from liability, and we must say it is very unreasonable these defendants should have it in their power to contract as they please, while other Railway Companies are prohibited from doing so by Act of Parliament: *Allan v. The Great Western R. W. Co.*, 33 U. C. R. 483; *Scott v. The Great Western R. W. Co.*, 23 C. P. 182. Although the drover's pass given to the plaintiff might make these conditions reasonable under the statute: *Pardington v. The South Wales R. W. Co.*, 1 H. & N. 392.

Some of the decisions will shew how far these carrying companies were able to protect themselves.

A condition that the company would not be liable for any loss or damage, *however caused*, was held not to be an unreasonable condition, because the plaintiff was getting

his goods carried, not on the usual terms, but on a special mileage rate : *Simons v. The Great Western R. W. Co.*, 18 C. B. 805.

In *Shaw v. The York and North Midland Ry. Co.*, 13 Q. B. 347, the condition was, that the drover undertook "all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage (however caused) occurring to horses or carriages, while travelling, or in loading or unloading."

In *Wise v. The Great Western R. W. Co.*, 1 H. & N. 63, the notice was: "The directors will not be answerable for damage done to any horses conveyed by this railway," which the forwarder signed. The horse arrived at the proper station to be delivered. No one called for it. It was forgotten and was left tied up in a horse-box in an exposed situation for twenty-four hours, and was seriously injured by such neglect, and it was held the Company were protected by the condition.

In *Pardington v. The South Wales R. W. Co.*, 1 H. & N. 392, the condition was: "A pass for a drover to ride with his stock will be given. The Company is to be held free from all risk in respect of any damage arising in the loading or unloading, from suffocation or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever." Held, the condition was reasonable, because the drover had a free pass to enable him to go with the cattle for the express purpose of taking care of them.

In *Austin v. The Manchester R. R. Co.*, 10 C. B. 454, the ticket issued was "subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage, before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriages, and locomotive power only, the Company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor

for any damage, *however caused*, to horses, cattle, or live stock of any description, travelling upon their railway or in their vehicles." Held, the Company were protected from all risks, of whatever kind, and however arising, to be encountered in the course of the journey; and that the Company were not responsible for injury done to a horse from the firing of a wheel, in consequence of the neglect of the Company's servants to grease it; although, on the journey, on stopping at a station where the wheel was observed to become heated, the plaintiff's servant requested the defendants' servants to cause the carriage to be removed from the train and another substituted for it, but they declined, alleging there was no time, but they applied water to the wheel and greased it. At a further station, the wheel being still on fire, the station-master desired the driver to stop at the next station and grease it again. The driver did not stop as directed, and shortly afterwards the wheel broke down. The truck was broken to pieces, and one of the plaintiff's horses was killed and others injured.

I need only refer further to *Carr v. The Lancashire and Yorkshire R. W. Co.*, 7 Ex. 707; *McManus v. The Lancashire R. W. Co.*, 4 H. & N. 327; and *Peek v. The North Stafford R. R. Co.*, 4 B. & S. 1005, Additional cases.

After these cases it is impossible to say the conditions in question cannot or shall not apply, or that they do not afford a full defence; and with the fact of the plaintiff having got a pass to look after his own live stock, because of the stringency of these terms, it is not at all plain that the conditions are unreasonable.

On this appeal we are of opinion the defendants are right in saying the rule for a new trial should not be rescinded.

The appeal will therefore be dismissed.

Appeal dismissed.

MARTIN L. SMITH V. THE GRAND TRUNK RAILWAY OF CANADA.

R. W. Co.—Contract to carry beyond their own line—Liability.

The plaintiff purchased a ticket from defendants at Detroit for a first-class passage from Detroit to Washington, paying the fare for the whole distance. It had five coupons attached, perforated so that they could be detached and given up, each one being for the distance to be traversed over a different railway or omnibus route on the way. The plaintiff's trunk was checked to Buffalo, and, when near that place, a person took his check for it, with the coupon for the omnibus route to the station of the Erie Railway, by which the plaintiff was to proceed, and gave him an omnibus check across the city of Buffalo in return. The conductor of defendants' train, being asked by the plaintiff, told him it was right to give his check to this person. The omnibus line was paid by the Erie R. W. Co. The trunk having been lost owing to the neglect of the omnibus agent: *Held*, that the defendants were liable, for the contract was with them, to carry the plaintiff and his luggage the entire distance.

It was objected that defendant had forfeited his right to be carried by having stopped over on the journey, instead of making it a continuous one; but, *Held*, that defendants not having insisted on the forfeiture, if they had a right to do so, and having chosen to carry him and his luggage, were bound to do so with reasonable care.

DECLARATION: First count: that the defendants were common carriers conducting business in the United States and Canada, and as such agreed with plaintiff to carry his trunk and contents, knowing what such contents were, from the City of Detroit to the City of New York, safely, and deliver, or cause the same to be delivered, at the latter city to him for hire and reward; and the plaintiff delivered the said trunk and contents to be carried in pursuance of such agreement: that the defendants, disregarding their promise and duty, did not safely carry and deliver the same to the plaintiff as it was their duty, and it was wholly lost to the plaintiff; and the plaintiff, by reason thereof lost a number of valuable deeds for patents and patterns of invention, and clothing and other articles of value contained therein, and they thereby deprived the plaintiff of the use of the same, whereby plaintiff was prevented from completing agreements entered into in respect of said patents of invention, and lost the sale of a number of patent rights, and lost much time, and was put to much expense and

trouble in trying to obtain the same and in trying to replace them.

Second count: that defendants promised and agreed with the plaintiff for money then paid to them, to carry safely the plaintiff and his baggage and luggage, consisting of a trunk and its contents, the nature and value of which trunk and contents defendants were well aware of at the time, from Detroit through Canada to New York; and the plaintiff and his baggage, pursuant to such arrangement, started from Detroit in defendants' cars, and although defendants carried the plaintiff to New York, yet by their carelessness and negligence they lost the trunk and its contents, and by reason thereof the plaintiff lost a number of valuable deeds, &c.,—as in the first count.

Third count: that defendants converted to their own use and wrongfully deprived the plaintiff of the use and possession of plaintiff's goods, that is to say, one trunk and its contents, whereby plaintiff lost (as in first count.)

Pleas. 1. Not guilty, to the last count.

2. To the remaining counts, that they did not promise as in the said remaining counts is alleged.

3. For a second plea to the remaining counts, as far as they relate to the alleged deeds, patents, and patterns of invention alleged to have been in said trunk, and to any agreements alleged to have been made, as in said counts specified and alleged; that they had not any notice or knowledge of the contents of said trunks or any of them, or of the said deeds, patents, patterns, or other articles being in the said trunks or any of them, nor had they any knowledge or notice of the said alleged agreements as in the said counts alleged; and the said deeds, patents, and patterns were not personal baggage.

4. To the whole declaration; that the several trunks and their contents in the several counts mentioned are one and the same trunk, and that there were not several trunks and contents: that defendants received the plaintiff on their railway, with his said trunk at Detroit, in the declaration mentioned, and that at Detroit, according to law and the

usual course and practice of their business, defendants caused a check to be affixed to said trunk, and gave a duplicate to the plaintiff, upon the production of which the plaintiff, or any one to whom he might deliver it, would, in the usual course of business, be entitled to receive the said trunk and contents from them, all of which the plaintiff then knew and had notice of; and defendants did carry the plaintiff and his said trunk safely and without delay to the City of Buffalo, where their line of railway ends, and at Buffalo aforesaid, in the State of New York, the plaintiff delivered his said duplicate check so held by him as aforesaid to certain other carriers, intending and for the purpose of enabling the other carriers to get the trunk from defendants, and to carry it to the New York and Erie Railway: that the said other carriers in Buffalo presented the duplicate check to defendants and demanded the trunk, and thereupon defendants, according to the usual practice of their business, delivered the trunk and contents to the said carriers, who took and received the same from the defendants for the purposes aforesaid, and delivered up to defendants the said duplicate check, and also the check affixed to the said trunk, and the carrier took the trunk and its contents for the purpose aforesaid, and out of the possession of the defendants; and when the said trunk was so delivered by the defendants to the said carrier, it was, and its contents were, in the same state and condition as when delivered to them, which said matters in the plea are the grievances in the declaration complained of.

The plaintiff joined issue on the pleas. And as to the fourth plea: replied, that in order to carry him and his baggage further than Buffalo, as agreed, it was necessary that his baggage should be carried by omnibuses or otherwise from one railway station to the other at Buffalo, and the carriers referred to in the fourth plea, being servants of the defendants, and for such purpose, obtained the said check from the plaintiff, and the plaintiff has never received his said trunk and contents, but has wholly lost

the same and suffered the damages set out in the declaration through the carelessness of the defendants or their servants.

Defendants joined issue on the special replication.

And for a second rejoinder thereto pleaded: that they delivered the said trunk to the other carriers as the servants of the plaintiff, he (the plaintiff) having given them his said check as in the plea stated, and not otherwise, and that the said persons to whom the said baggage was so delivered were not the servants of the defendants, and when defendants delivered up said trunk and luggage in the plea mentioned and received back the check so by them affixed and given as in the plea mentioned, they ceased to have any further authority or control over the plaintiff's baggage in manner and form as in said plea alleged.

The plaintiff joined issue on defendants' rejoinder to the plaintiff's replication to defendants' fourth plea.

The cause was taken down for trial before Morrison, J., and a jury at the Spring Assizes for 1873, held at Hamilton.

The facts so far as regards the rights and liabilities of the parties, were substantially as follows:

The plaintiff purchased a ticket at defendants' office, in Detroit, for a first class passage from Detroit to Washington. This ticket had five coupons or checks attached to it, which were perforated for the purpose of being severed and delivered up as they passed over different railways or omnibus lines on the route, and there was a sixth, which apparently was intended to remain attached to the ticket itself.

The ticket was as follows:—

<p><i>Issued by Grand Trunk Railway.</i></p> <p>DETROIT TO WASHINGTON</p> <p>GOOD FOR</p> <p>ONE FIRST CLASS PASSAGE</p> <p>Only on presentation of this Ticket with</p> <p>CHECKS ATTACHED.</p> <p><i>Valid only within Thirty days from date of issue.</i></p>			<p>Form 951</p>	<p>03 C. J. BRYDGES.</p>	
	WASHINGTON.	<p>Issued by Grand Trunk R'y.</p> <p>NORTHERN CENTRAL R. R.</p> <p>SUNBURY</p> <p>TO</p> <p>WASHINGTON.</p> <p>Not Good if detached.</p> <p>FIRST CLASS.</p>	951	03	
	WASHINGTON.	<p>Issued by Grand Trunk R'y.</p> <p>PHILADELPHIA AND ERIE R. R.</p> <p>WILLIAMSPORT</p> <p>TO</p> <p>SUNBURY.</p> <p>Not Good if detached.</p> <p>FIRST CLASS.</p>	951	03	
	WASHINGTON.	<p>Issued by Grand Trunk R'y.</p> <p>WILLIAMSPORT AND ELMIRA R. R.</p> <p>ELMIRA</p> <p>TO</p> <p>WILLIAMSPORT.</p> <p>Not Good if detached.</p> <p>FIRST CLASS.</p>	951	03	
	WASHINGTON.	<p>Issued by Grand Trunk R'y.</p> <p>ERIE R. R.</p> <p>BUFFALO</p> <p>TO</p> <p>ELMIRA.</p> <p>Not Good if detached.</p> <p>FIRST CLASS.</p>	951	03	
WASHINGTON.	<p>Issued by Grand Trunk R'y.</p> <p>OMNIBUS.</p> <p>ERIE STREET DEPOT,</p> <p>TO</p> <p>EXCHANGE STREET DEPOT,</p> <p>BUFFALO.</p> <p>Not Good if detached.</p> <p>FIRST CLASS.</p>	951	03		
WASHINGTON.	<p>Issued by Grand Trunk R'y.</p> <p>GRAND TRUNK RAILWAY.</p> <p>DETROIT</p> <p>TO</p> <p>BUFFALO.</p> <p>Not Good if detached.</p> <p>FIRST CLASS.</p>	951	03		

There were perforations between each of the tickets, except between the Sunbury and Washington ticket and the main ticket.

The plaintiff's trunk, for the loss of which he sued in this action was checked to Buffalo. When at or near Buffalo, a person came on the cars and asked where he was going ; he said to Washington, on which the person took his check and gave him another, in the following form :—

.....
ERIE RAILWAY
DEPOT.

454.

E. HOOLE, *Inspector.*

He also tore off the ticket the check which was marked "Omnibus Erie Street Depot to Exchange Street Depot, Buffalo," kept it, and gave the plaintiff an omnibus check across the city in return. The plaintiff asked the conductor of defendants' train if it was all right for him to give his check to the omnibus man, and he said it was all right, and he gave it to him.

The omnibus man in his evidence said that the Omnibus Company only took the coupon from the ticket issued by defendants for the fare across the city, and did not issue another ticket therefor.

As the plaintiff was getting into the omnibus in Buffalo he saw his trunk at the defendants' station, and wished to take it with him on the omnibus, but the person in charge said it would go with the luggage. He then crossed the city to the Erie station, but his trunk did not reach its destination.

The agent of the Omnibus Company recollected seeing a trunk with a model of a ladder strapped on it, amongst the luggage he had received from the Grand Trunk, and which was lost; no doubt this was the plaintiff's trunk. He said he obtained this trunk from the baggage-man of the railway on delivering to him the check issued by them for it: that he got this check from a passenger by the railway after the boat had crossed the river and before it reached defendants' depot in Buffalo, and he gave the check of the Omnibus Company, produced, for it: that he had no doubt the plaintiff was carried across the city by the Omnibus Company on the coupon attached to the ticket originally issued by defendants, and that the coupon was torn off and kept by the Company. He further stated that the Omnibus Company were paid by the Erie Railway for carrying the passengers on these coupons as well as the luggage across the city. They carry the passengers from one depot to the other upon the authority of the coupon of the defendants' Company.

At the end of the case the defendants' counsel contended the plaintiff was not entitled to recover: that the

responsibility was not thrown on them; the loss was occasioned by the Omnibus Company, who took possession of plaintiff's trunk, and it was lost whilst in their hands or that of the Erie Railway, who paid the Omnibus Company for carrying it: the journey was from Detroit to Buffalo and the fact of the plaintiff remaining over shewed it, and the responsibility as to baggage attached only to their own line.

As to damages, the defendants objected that the plaintiff was not entitled to compensation for loss of the patents, as claimed in the particulars. As to this part of the claim the learned Judge ruled that the plaintiff was not entitled to recover. He was inclined to agree with the views of the defendants' counsel on the other point, but he allowed the case to go to the jury, and reserved leave to defendants to move to enter a nonsuit.

The only question he left to the jury was one of damages, and they found for the plaintiff, damages \$141.50.

In Michaelmas Term, 1873, *C. S. Patterson*, Q. C., obtained a rule *nisi* on behalf of the defendants, to set aside the verdict and enter a nonsuit, pursuant to leave reserved.

In Easter Term last, *MacKelcan* shewed cause. The plaintiff bought a ticket for the whole trip, and paid for the whole journey. The ticket issued was in fact that of the defendants, and was retained by the plaintiff to the end of the journey. The coupons were merely the authority from the defendants to the other railway companies to pass him and his luggage over their lines, and they did so by their direction, and must in law be considered as their servants. The only contract made by the plaintiff was with the defendants, and he could only sue them for the loss of his baggage: *Thomas v. Rhymney R. W. Co.*, L.R. 5 Q. B. 226, in Ex. Ch. L. R. 6 Q. B. 266; *Buxton v. North Eastern R. W. Co.*, 3 Q. B. 549; *Great Western R. W. Co. v. Blake*, 7 H. & N. 987; *Muschamp v. Lancaster & Preston Junction R. W. Co.*, 8 M. & W. 421; *Scothorn v. South*

Staffordshire Railway, 8 Ex. 341; *Mytton v. Midland R. W. Co.*, 4 H. & N. 615. It was their duty to carry the luggage safely as common carriers, and that duty continued over the lines of all the roads. At all events there was clearly negligence in the agent of the Omnibus Company, who left the plaintiff's trunk outside the station, and it was stolen when he went to look for the other luggage. Besides, the plaintiff wished to take it with him in the omnibus, but the agent said it would go with the other baggage. As the Omnibus Company must be considered defendants' agents, they are liable for the neglect: *Jordan v. Fall River R. W. Co.*, 5 Cush. 69; *Giles v. Taff Vale R. W.* 2 E. & B. 822; *Goff v. Great Northern R. W.* 3 E. & E. 672; *Butcher v. London & South Western R. W. Co.*, 16 C. B. 13; *Richards v. Great Western R. W. Co.*, 7 Q. B. 839. The 99th sec. of Consol. Stat. C. ch. 66, shews that the defendants' duty is to carry luggage, and their common law liability is not affected by the check.

Patterson, Q.C., contra. The only contract as to carrying the plaintiff's luggage is from Detroit to Buffalo, and this the check, which the Company is bound to give under sec. 99 of the Railway Act, shews.

The Company are not insurers, and are only bound whilst the passenger and his luggage are on their line. For the convenience of the passenger they received the passage money for the whole journey, and distributed it amongst the others. Besides, the evidence shewed that the Omnibus Company were the servants of the Erie Company, and they paid them for transporting the passengers and baggage from one station to the other: *Zunz v. South Eastern R. W. Co.*, L. R. 4 Q. B. 539; *Collins v. Bristol & Exeter R. W. Co.*, 11 Ex. 790; S. C. in Ex. Ch., 1 H. & N. 517; S. C. 7 H. L. 194; *Benett v. Peninsular & Oriental Steamboat Co.*, 6 C. B. 782; *Redfield on Carriers*, p. 57, sec. 71, 72; *Brooke v. Pickwick*, 4 Bing. 218; *Talley v. Great Western R. W. Co.*, L. R. 6 C. P. 44; *Wright v. Midland R. W. Co.*, L. R. 8 Ex. 137; *Great Western R. W. Co. v. Blake*, 7 H. & N. 987; *Thomas v. Rhymney R. W. Co.*, L. R. 5 Q. B.

226, in Ex. Ch. L. R. 6 Q. B. 266. Besides, it was shewn that the plaintiff's journey, which ought to have been continuous, was broken, and therefore the plaintiff could not recover: *Craig v. Great Western R. W. Co.*, 24 U. C. R. 504. The trunk having reached the place to which it was checked by defendants, they were not liable because it was stolen afterwards: *Penton v. Grand Trunk R. W. Co.*, 28 U. C. R. 367.

RICHARDS, C. J., delivered the judgment of the Court.

The plaintiff's right to recover in this action depends on two questions. First, whether the contract to carry him to Washington from Detroit is one made with and binding defendants' company? and, second, whether they agreed to carry his luggage as well as himself?

If the other Railway and Omnibus Companies are to be considered as the agents and servants of the defendants in carrying passengers and their luggage on through tickets, then this trunk was without doubt lost by the negligence of the agent of the Omnibus Company. According to his statement, having received the check from the plaintiff, he obtained the trunk on it from the defendants' baggage master, left it at the door of the station without anyone to look after it, and went into the station to get other luggage, and whilst he was absent the trunk was stolen. Had it not been for his negligence the trunk would not have been lost. On this point it is not necessary to consider whether the railway were to be viewed as insurers, bound to carry and deliver the trunk at all hazards, or as liable only for negligence on the part of their servants, the negligence or want of proper care being sufficient to make them liable.

Nor is it necessary to decide whether, under the ticket on which the plaintiff travelled, the defendants might have refused to carry him at all; or whether they might have claimed that he had forfeited his right to travel on that ticket, as his journey had not been continuous, he having stopped over at St. Mary's and Caledonia.

The answer is, the company did not choose to assert their right to "enforce the forfeiture," if they had such a right; they did not refuse to carry him; and having undertaken to carry they were bound to exercise reasonable care, and they could not excuse themselves for their negligence on the ground that they might have refused to carry at all. If they had refused to take him on that ticket he might have bought another, or not going at all, his trunk would not have been lost.

There is nothing wrong, or unjust, or unreasonable, when a company has received the money for carrying a passenger from one place to another, that they should do so, even though they might be at liberty if they chose to enforce their strict technical rights to keep his money and refuse to carry him.

If their tickets or officers gave no warning to a passenger that by stopping over the company were not bound to carry him on that ticket, and they afterwards did carry him on that ticket, and gave him no warning that he had not a legal right to be so carried, it would seem to be something the opposite of fair dealing to allow the company to set up such a defence when they had injured him in his person or lost his property by their negligence.

We think, therefore, we must decide this question on the broad ground whether the defendants are bound on this contract to carry the plaintiff through from Detroit to Washington, and whether they are bound to carry his luggage as well as himself.

The leading case on the subject of the liability of a railway company which has connecting lines, for the loss of goods beyond their own line which have been delivered to them to forward, is *Muschamp v. Lancaster and Preston Junction R.W.Co.*, 8 M. & W. 421.

The case was tried before *Rolfe*, B., and he thus, in summing up, at p. 423, stated the law to the jury: "That where a common carrier takes into his care a parcel directed to a particular place, and does not by his positive agreement limit his responsibility to a part only of the distance, that

is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and * * the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier."

There the plaintiff's agent offered to pay the carriage to the place of destination, but the defendants' agent said it might be paid when the articles reached that place. They were lost beyond the line of defendants' railway. The jury found for the plaintiff, and the Court upheld the verdict.

In giving judgment, *Rolfe*, B., said, p. 430: "If I book my place at Euston Square, and pay to be carried to York, and am injured by the negligence of somebody between Euston Square and York, I do not know why I am not to have my remedy against the party who so contracted to carry me to York."

Wilby v. The West Cornwall R. W. Co., 2 H. & N. 703, was for injury to goods beyond the terminus of the railway, which were forwarded by the railway.

In *Mytton v. The Midland Railway*, 4 H. & N. 615, the plaintiff took at the Newport station of the South Wales Railway a ticket to Birmingham, for which he paid the entire fare. The South Wales Railway extends from Newport to within 12 miles of Gloucester, which latter distance is traversed on the G. W. Railway; and the Midland Railway have a line from Gloucester to Birmingham. By arrangement between the three companies tickets are issued for the entire distance, and the fares divided between them, according to the mileage travelled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales Railway carriage and delivered it to a guard of the Midland Railway Company. On the arrival of the train at Birmingham the portmanteau was missing. It was held that the contract was an entire contract with the South Wales Company to convey the whole distance from Newport to Birmingham, and consequently the Midland Railway were not liable. There

was a clause in the South Wales Company's charter by which passengers took their luggage at their own risk, but there was no such provision in the charter of the Midland Railway.

In giving judgment, *Martin*, B., said, p. 621: " We are of opinion there was but one contract, and that that contract was with the South Wales Railway Company, and not with the Midland Railway Company. There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the Midland Railway Company to that contract, except that, by arrangement with the South Wales Company, they conveyed over their line passengers booked from Newport to Birmingham. We think the principle of *Muschamp v. The Lancaster and Preston Junction R. W. Co.* applies to this case; and as there was no contract with the Midland Railway Company, the plaintiff fails in this action, and the defendants are entitled to our judgment."

In *Great Western R. W. Co. v. Blake*, in the Exchequer Chamber, 7 H. & N. at p. 991, Cockburn, C. J., said: " It has been settled that when a railway company enters into a contract for the conveyance of goods to a distance extending, not merely over their own line, but over the whole or some portion of any other line of railway with which it is connected, the company so contracting is liable not only for the loss of the goods upon their own line, but also in respect of the loss of the goods upon the line not their own. I think that position obtains in the case of passengers. If a railway company chooses to contract to carry passengers not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line."

Crompton, J., said, at p. 993: " When the Great Western Railway Company gave a ticket to the plaintiff to travel from Paddington to Milford, they took upon themselves all the responsibilities by which a railway company is bound with

reference to the carriage of passengers the whole distance. I say the carriage of passengers, because Mr. Bovill has distinguished between passengers and goods as regards the extent of liability. When railways were first established some companies would only undertake to convey passengers part of the way on a long journey on their own line; others conveyed passengers beyond their own line, but refused to be responsible for what might occur on a line not their own; others made an arrangement with other companies by which, for one fare, for the whole distance, they undertook to convey passengers to particular places on the line of another company."

In *Thomas v. Rhymney R. W. Co.*, L. R. 6 Q. B. in the Exchequer Chamber, 266, Kelly, C. B., said, at p. 273: "I am still of opinion, upon every principle of law, justice, and reason, when a ticket is issued, say, for example, at Euston Square station, for the conveyance of a passenger to Edinburgh, or still further north, where the traveller may in the course of his journey have to pass over several lines of railway belonging to different companies, that the contract which was entered into by the company that issues the ticket is a contract that reasonable care shall be exercised by all by whom exercise of care is necessary for the reasonably safe conveyance of the passenger from one end of the journey to the other. The company who issued the ticket received the entire consideration."

Zunz v. The South Eastern Railway Co., L. R. 4 Q. B. p. 539, is a case somewhat resembling this. There the plaintiff took a ticket of the defendants' company, to be conveyed as a passenger from London to Paris. The ticket was in three coupons—1. from London to Dover; 2. from Dover to Calais; 3. from Calais to Paris. There was printed on the railway ticket, "The South Eastern Railway Company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Railway Company's trains or boats."

The plaintiff's portmanteau was lost between Calais and Paris, on the French railway. It was held the company was protected by the condition. The plaintiff's luggage was in excess of the weight allowed a first-class passenger. The plaintiff paid the company 3s. for the excess. The portmanteau was registered through to Paris.

In giving judgment, Cockburn, C. J., said, at p. 543: "I think it is unnecessary to decide * * * whether the contract with the company was a contract binding them to carry the plaintiff and his luggage for the entire journey from London to Paris. I am strongly disposed to think that it is such a contract. It is not a contract limited to carry on the defendants' own line: it is not a contract made between plaintiff and the defendants to carry to the extent of their line, in their own behalf, and with the other two companies, as regards the sea passage and the land journey through France, as agents for the other two companies. I am strongly disposed to think that it is a contract whereby the South Eastern Railway Company contract to convey the plaintiff to the end of their own line, and then contract that he shall be conveyed by the other two companies from Dover to Calais, and again from Calais to Paris; but it is not necessary to determine that question."

The Court held that the defendants were relieved from the liability by the condition which was contained in the ticket on which the plaintiff travelled, the loss having occurred by the negligence of the servants of the French railway. They also held that the Railway and Canal Traffic Act of 1854 did not apply to conditions in relation to lines not worked by the companies themselves. The conditions related to the line in a foreign country, and therefore the defendants were protected by them.

In *Wright v. The Midland Railway*, L. R. 8 Ex. 137, one of the latest reported cases, at p. 144, Cleasby, B., said: "I quite agree that a contract for carriage from one place to another extends over the whole journey, whether upon the line of the contracting company, or not, and further,

that it is the carrier's duty to use due and reasonable care during the whole journey."

Pollock, B., said, at p. 147: "There can be no doubt that, in all those instances, the first contracting company would be liable."

In the *Peninsular & Steam Company v. Shand*, in the Privy Council, 12 L. T. N. S. 808, some of the plaintiff's luggage was lost on a passage from Southampton to the Mauritius. Amongst the conditions endorsed on the ticket was one exempting the company from loss. The company's officer took charge of the luggage on the arrival of the steamer at Alexandria, and the plaintiff was told it would meet him safe on board the Ceylon on the other side, meaning Suez, on the Red Sea. The missing article was last seen in the small steamer which took the passengers from the shore to the Norma, which took them to the Mauritius. The plaintiff's servant was about to take it on board the Norma, when one of the stewards told him not to do so, he would take charge of it. It was never seen after. The Privy Council, reversing the decision of the Court at the Mauritius, where the French law prevails, held that the *lex loci contractus*, England, regulated the plaintiff's rights, and as, under the condition endorsed on the ticket, defendants were not liable according to the law of England, the judgment must be reversed.

In the case of *Collins v. The Bristol & Exeter R. W. Co.*, in Appeal, in the House of Lords, 7 H. L. 194, the plaintiff in the Court below delivered goods to the Great Western Railway addressed to Torquay, which was on the Bristol line, a continuous line to the Great Western. The Great Western received the carriage for the whole distance to Torquay, but the sending note contained a condition that the company would not be responsible for goods lost by fire. There was also a reference to all goods addressed to consignees beyond the Great Western Company's limits, that they would be forwarded by public carriers or otherwise, but the charges of such carriage would be added to those of the company, and the responsi-

bility of the company would cease when the carrier had received such goods. The goods were lost by fire after being delivered over to the Bristol line. It was held that the Great Western Company undertook to carry the goods the whole way to Torquay ; that therefore the Bristol company was not liable at all ; for either there was no contract made with them, or if there was, then the condition exempting them from loss by fire attached and protected them.

Crompton, J., delivered the opinions of four Judges to the House of Lords. In speaking of the different contracts made by railway companies for the carriage of goods, he said, at p. 211, 212 : “ * * Where the carrier receives the goods to carry from A. to B., and where having so received the goods to be so carried, he is bound to carry them by himself or his agents. If he contracts with another company to carry them beyond the place where his own means of carriage extend, he is answerable as a common carrier just as much as if he had carried them in his own carts * * or on his own railway ; it is nothing to the parties sending the goods in what way he performs his undertaking for the care and carriage of the goods. This is the common case where goods, parcels, or *passengers*, are booked at a railway station as from A. to B. When the facts are ascertained there is no difficulty as to the law ; and nothing could be further, I believe, from the minds of any of the Judges who decided the present case in the Exchequer Chamber than to entertain any doubt of the principle upon which *Muschamp v. The Lancaster and Preston Junction R. W. Co.*, and other cases of that description, were decided, and which is acted upon by Judges and juries without any doubt at almost every sittings and assizes. Companies not liking such liabilities for loss and accidents, where they have no control beyond their own line of railway or their own carriage, frequently adopt a different mode of contracting, and absolutely refuse to book beyond their own line.

And at p. 214 : “ It must be remembered that the car-

rier in these cases is not bound to undertake to carry goods beyond his own line, and there is no law to compel him to undertake any further duty with respect to the goods, and it must depend entirely on the contract whether he undertakes any duty after the goods have arrived at a place beyond which he does not carry."

Martin, B., said, at p. 224: "They make but one charge for the entire journey, which is to be paid to the plaintiff in one sum at the end of the journey at Torquay, and which is stated in express terms to be the charge of the *Great Western Railway Company*, * * and at p. 226, "In my opinion, therefore, there was no privity between the plaintiff and the defendants; the privity was between him and the Great Western Company alone. There was a privity between the companies upon their contract as regards themselves to apportion the amount charged, * * but with this the plaintiff had nothing to do."

Lord Cranworth, in giving his judgment, observed, at p. 235: "A person sending goods by a railway cannot be supposed to know, in case of a continuous line, who are the owners of its different portions. He has a right to suppose, when the officers of the company at one extremity receive goods to be delivered at another extremity, either that the whole line belongs to them, or, at all events, that they mean so to represent it, and that they contract on that footing."

We think these authorities shew that when the owner of goods delivers them to a railway to be forwarded to a point on an adjacent or distant line of railway, and the company to whom he delivers them receives them to be so carried, charges but one fare for the carriage from the point of delivery to their destination, and in no way contracts or stipulates that they are only to be answerable for the negligence or want of care whilst on their own line, and that they shall not be liable for any accident which may happen from the want of care of other lines, when the goods are lost or destroyed in the passage over other lines by the negligence of the other lines, the company first

receiving the goods from the owner will be liable for such loss, and that the owner of the goods, for want of privity with such other companies, cannot maintain an action against such companies for the loss or destruction of the goods.

This is the result of the English authorities. It is said that the American Courts hold that where the *line* is composed of several carriers, the carrier to whom the goods are delivered by the consignor is liable for their loss, but the consignor shall not be precluded from suing the carrier actually guilty of the negligence; as between themselves the carrier guilty of the negligence is liable for damages in case the consignor sues the carrier to whom the goods were delivered by him. The American case is the *Chicago & North Western Railway Co. v. North Line Packet Co.*, referred to in the Law Times of 21st November, 1874, at p. 39.

The same principle also extends to the safe carriage of passengers and their luggage. When a company sells a ticket to a passenger to a point on connecting lines, and receives the full fare for passing over all the lines, and no conditions limiting the liability are contained on the ticket or any other instrument binding the passenger, it seems to us that is evidence of a contract, and that a jury, in the absence of anything to repel such inference, may fairly say that the company undertakes to carry the passenger and his luggage safely as much over the connecting lines as they do over their own.

Our attention was not directed on the argument to any statutory provision regulating the carrying of baggage by the defendants' railway except to the 99th section of the Railway Act.

The 20th section of that Act provides for the fixing and regulating of tolls to be demanded and received for all passengers and goods transported upon the railway.

The 95th section forbids any servant of the company employed in a passenger train, &c., who does not wear his badge, from meddling or interfering with any passenger or his baggage or property.

The 96th section requires that sufficient accommodation be had for the transportation of *passengers and goods*, offered for transportation.

Sec. 97, provides that "Such passengers and goods shall be taken, transported, and discharged, on the due payment of the toll, * * freight or fare legally authorized therefor."

The 98th section gives an action to any party aggrieved for neglect or refusal of the company in the premises.

By section 99, checks shall be fixed by an agent or servant to every parcel of baggage having a handle, loop, or fixture of any kind thereupon, and a duplicate of such check shall be given to the passenger delivering the same.

By section 100. If such check be refused, the company shall pay to the passenger \$8, to be recovered in a civil action, and no fare or toll shall be collected or received from such passenger, and if he has paid his fare the same shall be refunded by the conductor in charge of the train.

By section 101. Any passenger producing such check may himself be a witness in any suit brought by him against the company, to prove the contents and value of his baggage not delivered to him.

It was not suggested nor contended before us that the sum paid by the plaintiff for his ticket did not cover the charge by the company for transporting his baggage.

Under the circumstances we think a jury would be well warranted in assuming that for the amount paid the company agreed to carry the plaintiff and his baggage. They did in fact take charge of his baggage, gave him a check for the same, and claimed no extra charge therefor.

It is urged, however, that all they intended to undertake by this was to carry his baggage safe to Buffalo. Was it expected or intended that he was to pay the contracting companies for carrying his baggage from Buffalo to Washington, any more than they were to charge additional fare for conveying himself?

It may be he received a check only to Buffalo, but he received a ticket to Washington. The company's cars

took him to Buffalo ; he could not compel them to take the same car to convey him to Washington, and after he got on the Erie line, the probability is, the conductor on that line took from him the coupon which the defendants' company gave him to pass him over that road, and gave him a check ticket on that road—would that interfere with the contract which defendants made, and the evidence of which he still retained in the ticket itself, which he had bought for his passage from Detroit to Washington ?

The defendants wished no doubt to use the car on which they had brought the plaintiff to Buffalo, and to take it back over their line to Sarnia or Detroit.

They also probably desired to retain for their own use the check they had given to the plaintiff by which they were enabled to know what luggage was to be sent on, and what was to be retained in Buffalo. According to the plaintiff's statement, not denied, the defendants' conductor told the plaintiff it was proper for him to give the check to the agent of the Omnibus Company, and to take from him the delivery check for the Erie station. That process was necessary to enable defendants to get back their checks, and to enable the Erie Company properly to receive directions as to the destination of the baggage after it had reached their station.

We fail to see how this mode of changing cars or changing checks can really make any difference as to defendants' liability. The liability arises from the contract to carry. The giving checks is quite as much for the convenience and safety of the company as it is for that of the passenger ; it is a guaranty to them that the right person gets the luggage.

The mere taking off their checks to enable the connecting line to put theirs on, cannot in any way relieve the defendants from the negligence of the officers of the other companies for which they are liable.

It is said, however, that the Omnibus Company was paid for transferring the baggage and passengers from one station to the other by the Erie Railway, and the Omnibus Company was the servant of that company, and not of the defendants.

There is no doubt that the conductors, drivers, and baggage masters on the Erie road were all paid by them, and were all their servants, as well as the Omnibus Company. We fail to see how that can make any difference.

We suppose the defendants' company paid the Erie Company for taking their passengers with their baggage from their (defendants') Buffalo station to Elmira, and there transferring the passengers and baggage to the Elmira & Williamsport Company. We do not suppose that these companies carried the passengers without charging the defendants therefor.

Looking at the facts, we think a jury would be well warranted in finding that the defendants undertook to carry the plaintiff and his baggage from Detroit to Washington, and they failed to carry his baggage, and the same was lost without any negligence by the plaintiff, but by the negligence and want of care of those persons whom defendants employed to carry out their contract beyond the line of their own road.

The 131st section of the Railway Act seems to contemplate traffic arrangements with other companies either in the Province or out of it; and 24 Vic., cap. 17 sec. 6, declares, in reference to the amending sections of the Railway Act, that "*traffic*" not only includes passengers and their baggage, goods, animals, &c., but also cases, trunks, &c.

The defendants were thus authorized to make arrangements for the carriage of through passengers and their baggage with other companies, and no doubt have arranged to protect themselves from loss on account of the negligence of the servants of connecting lines. The rule will be discharged.

Rule discharged.

SMITH V. MURPHY.

Misdirection—New Trial—Administration of Justice Act, 1874, sec. 34.

In an action for trespass to land the jury found for the plaintiff, with only one shilling damages. The verdict was moved against for misdirection and smallness of damages, but the Court without deciding upon the correctness of the charge, held that if it had been unexceptionable and the verdict the same they would not have interfered; and, under sec. 34 of the Administration of Justice Act, 1874, they refused a new trial.

DECLARATION. First count: trespass on the north-east quarter of lot 106, in the first concession of the township of Tay, and depasturing the same with cattle.

Second count: for removing a division line fence between plaintiff's and defendant's land, whereby cattle escaped from defendant's land to plaintiff's, &c.

Third count: for entering on plaintiff's land, breaking down fence, and carrying away rails.

Pleas, not guilty, and leave of license.

To first, second, and third counts: land not plaintiff's; to first and third counts: liberum tenementum; and to third count, fence not plaintiff's; issue.

The case was tried before A. N. Richards, Q. C., sitting for Richards, C. J., at the Barrie Assizes last Spring.

The following facts appeared at the trial. The plaintiff was lessee under his father of the north-east quarter of lot No. 106, in the 1st concession of Tay, for a term of five years, expiring in January, 1876, at a rent of \$50 a year. The defendant was the owner of the south half of the same lot. A division line fence had been put up between the lots some twelve or fourteen years ago. In 1872 a line was run by some surveyors on account of the Midland Railway Company, who had purchased the land from the lessor, and those surveyors placed the division line some eight rods in upon the plaintiff's land. Some weeks after, the line fence was removed by the defendant or some one on his behalf, and the defendant's cattle was put in plaintiff's meadow, &c.; and defendant, although forbid to do so, continued to put in his cattle on the plaintiff's place, &c. The plain-

tiff estimated his damages, during the two years that he alleged this state of things existed, at over \$200.

On the part of the defence, the defendant, on his examination, denied taking down any portion of the fence in 1872; but admitted that he did remove a portion of the fence, but denied putting his cattle on the plaintiff's land; and said the plaintiff did not object to the removal of the fence. Evidence was also given, that for years the plaintiff's fence was very imperfect, and that the neighbours' cattle could readily pass into the plaintiff's meadow; and a good deal of evidence was given, *pro* and *con*, as to the character of the plaintiff's meadow, and the quantity of hay it would produce.

The defendant, to prove that the slip of eight rods in dispute belonged to him, called a surveyor named Burnett, who made a survey to ascertain the limit between the half lots, and who stated what he done to do so; and according to his view of it, the line which had been previously made in 1872 was correct, and the division line was as claimed by the defendant.

On the other hand, the plaintiff called a surveyor, who testified that in his opinion Mr. Burnett did not adopt the proper mode to ascertain the proper bearing of the division line; but he did not, nor would, say that the line ran by Burnett was not the true line, but he thought it not probable.

It also appeared that the lot in question was one laid out in 1812, along the Penetanguishene road, which commenced on Lake Simcoe, running to Lake Huron, about thirty-three miles, and the lots numbered from 1 to 124; and that the township of Tay was a township laid out in 1820. The plaintiff's surveyor, in order to ascertain the division line, adopted the mode pointed out by the statute, viz., the course of the southern boundary of the township from which the lots numbered. The plaintiff's surveyor stated these lots were laid out at right angles to the Penetanguishene road, and that to ascertain the course of the division line was to ascertain that bearing of the

Penetanguishene road in front of the lot, and lay out a right angle course; and that the proper way was not to run parallel to the southern side of the township; and he also said that he was aware that the line which Burnett followed was not a line at right angles to the road; but he would not say that Burnett's line was wrong on the merits.

No objection appeared to have been taken to the reception of Burnett's testimony.

The learned Judge told the jury, that as to the first count, if they believed the survey of Burnett to be correct there was no trespass on the eight rods; but if they believed the defendant turned his cattle and horses into the meadow or pasture of the plaintiff, to find for the plaintiff; as to the second count, if they believed the defendant removed the line fence so as to expose the plaintiff's land, and plaintiff was injured thereby, to find for the plaintiff; as to the third count, the plaintiff gave it up.

The charge was objected to on the ground that there was no evidence that the eight rods was the defendant's land, and that the jury should have been told that the survey was illegally made.

The jury found for the plaintiff on the first and second counts, and one shilling damages.

During Easter term (21st May, 1874), *McCarthy*, Q. C., obtained a rule *nisi* to set aside the verdict, and for a new trial, on the grounds of misdirection in the learned Judge who tried the cause in holding and charging the jury that the survey made by Mr. Burnett, P.L.S., was evidence to go to them that the portion of land shewn by such survey to belong to the defendant's land was the land of the defendant; that the said survey was illegally made, as having been made with reference to the governing line of the township in which the land was situate, instead of at right angles to the line on which the said lots of both parties were laid out; and for misdirection in telling the jury that the plaintiff not having had a survey made, the presumption was that the defendant's survey was right; and for smallness of damages.

During this term (26th November, 1874) *R. A. Harrison*, Q. C., shewed cause. Consol. Stat. U. C., ch. 93, sec. 22, does not apply to such a case as the present. It was intended that the concession line should be parallel to the governing line. He referred to *Johnston v. Hunter*, 25 U. C. R. 348; *Re Scott and The Corporation of the County of Peterbororough*, 25 U. C. R., 453. As to smallness of damages, see *Percy v. Glasco*, 22 C. P. 521.

McCarthy, Q. C., contra. The line was run fifteen or sixteen years ago by both parties, and no dispute occurred till the Midland Railway Co.'s survey threw defendant further north, and then he endeavored to throw the plaintiff further north also. As to the second count, he referred to *B. & L. Prec.*, 3rd ed., 329; Consol. Stat. U. C. ch. 57. The Courts will sometimes interfere for smallness of damages: *Armytage v. Haley*, 4 Q. B. 917; *Springett v. Balls*, 1 W. N. 191; *Kelly v. Sherlock*, L. R. 1 Q. B. 686. Consol. Stat. U. C. ch. 93, sec. 22, does apply.

December, 22, 1874, MORRISON, J., delivered the judgment of the Court.

In this case the jury have found for the plaintiff on the two first counts, the plaintiff assenting to a verdict against him on the third count.

In other words, the jury found that the defendant trespassed on the plaintiff's land; in that respect the plaintiff has nothing to complain of.

But it is said that the amount of damages is altogether too small, and it is suggested by the plaintiff's counsel that the finding in that respect was influenced by the learned Queen's counsel who tried the cause having misdirected the jury, and leaving it to them to say whether the line as laid down or run by the defendant's surveyor, Burnett, was the true or correct line, and telling them if they found so that there was then no trespass as to the strip of eight rods; and even if that were so, if the defendant put his cattle, &c., into the plaintiff's meadow or pasture beyond the eight rods, the plaintiff was entitled to recover.

Assuming the learned Queen's Counsel erred in so leaving the case to the jury, it is quite consistent with their finding that they found that Burnett's line was not the division line; and if they took that view of the evidence, can we say that the jury, in giving one shilling damages, were influenced to do so by the charge?

The evidence was very conflicting as to the extent of the trespass and the damages sustained; and it was one of those cases peculiarly within the province of a jury to pass an opinion in those respects. It may have been one of those actions where the plaintiff was entitled to recover, and yet suffered little or no pecuniary damage, and that the jury believed that the defendant acted under the impression the eight rods was part of his lot, for it appeared in evidence that he so notified the plaintiff and demanded possession.

If the jury, believing the testimony on the part of the defendant, were of opinion, upon the whole case, the plaintiff sustained no pecuniary damage, can we say that they were wrong in doing so?

It is true, that on the evidence they might have given the plaintiff substantial damages; but their not doing so does not necessarily entitle the plaintiff to a new trial.

Without considering the question of misdirection complained of, and granting that the learned Queen's Counsel misdirected the jury, or allowed improper evidence to go to them, under the 34th sec. of the Administration of Justice Act, 1874, which I think is a very salutary enactment, it is provided that "A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court to which application is made some substantial wrong or miscarriage has been thereby occasioned in the trial," &c.

Now, take this case being left to the jury with an unexceptionable charge, the jury being told they were to find for the plaintiff, and to say the amount of damages, and the jury found as they have done, would we disturb the verdict on account of the smallness of the damages? I would not be disposed to do so.

One thing struck me as unaccountable--why this plaintiff should have suffered the defendant, as he alleges, to commit damage for two years without taking some steps to assert his rights.

We think we would be doing an injury to these parties to prolong this litigation by granting a new trial, which would only involve them in additional costs and expenses far beyond the whole amount of the damages sustained, or that would be likely to be recovered should another jury take a more favorable view of the plaintiff's case.

In *Mostyn v. Coles*, 7 H. & N. 872, Wilde, B., said, at p. 876: "The verdict is impeached on the general ground that the finding of the jury in favor of the plaintiff with nominal damages is inconsistent with the evidence, inasmuch, as the damage must either have been more, or there was no cause of action; and it has been contended that, where this is the case, the Court will set aside the verdict and grant a new trial. I cannot subscribe to that position. Such a verdict is a result of trial by jury, and it affords no ground for setting the verdict aside."

On the whole, we think the rule ought to be discharged.

Rule discharged.

COGHLAN V. THE SCHOOL TRUSTEES OF SCHOOL SECTION
No. 4, IN THE TOWNSHIP OF TILBURY EAST, IN THE
COUNTY OF KENT.

Agreement under seal—Parties—Building contract—Performance.

The agreement sued on was headed "Specification of school-house in School Section No. 4, Tilbury East." Then followed in detail the size of the building, and the work and material to be employed, and it concluded: "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of \$708, one-half on the 15th May, and the other half when the said school-house is completed." Then followed the signatures of the three school trustees, with their corporate seal, and the signature of the plaintiff. It bore no date, but was proved to have been executed by the parties about the 1st March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him \$400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly constructed, but the learned Queen's Counsel, who tried the case without a jury, found for the plaintiff for the balance of the \$708.

Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld.

DECLARATION, on a covenant in an agreement for the building of a school-house, and on the common counts.

Pleas: 1st. Did not covenant as alleged.

2nd. That the plaintiff did not erect and finish the school-house in a workmanlike manner, and of good material, and according to the specifications furnished him as alleged.

To the common counts, never indebted, and payment.

The case was tried at the Spring Assizes, at Chatham, before S. Richards, Q.C., sitting for GWYNNE, J.

On the trial the plaintiff put in an instrument signed by the trustees individually, and with the seal of the defendants' corporation.

This instrument was headed, "Specification of school-house in school section No. 4, Tilbury East;" and then followed detailed specifications of the building, &c.; concluding, "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st of July, 1873. In consideration the parties of the first part agrees to pay the party of the second part the sum of

\$708 of lawful money of Canada, one half on the 15th day of May, and the other half when the said school-house is completed." Then below were the signatures of the three trustees, and the seal of the corporation, with the corporate name engraved, and below that the signature of the plaintiff.

The plaintiff stated in his evidence that that was the agreement between the defendants and himself, and that under that agreement he proceeded to build the school house: that it was built on a lot belonging to the defendants, and a plan, which was produced at the trial, was by the trustees given to him, by which he was to work: that the contract, which bore no date, was signed by the trustees about the 1st of March, 1873, and the seal of the defendants put to it: that he was asked by one of the trustees to tender for the work: that he did so and his tender was accepted: that he built the house according to the specifications and the plan, and that he completed it about the middle of July: that it was built of good material and in a workmanlike manner: that no objection was made to the work not being done by the 1st of July: that he was paid \$400 on account of the contract, \$200 in the beginning of June, and \$200 on 4th July: that he demanded payment of the amount due: that the defendants told him that if he would throw off \$58, and put in four more abutments under the building, they would pay the balance, \$250: that he put in all the abutments shewn in the plan, the reason assigned for the deduction by the defendants being on account of there being no collar beams in the roof, and that the building was twisted at one end: that the collar beams were not called for by the specifications, and the twist complained of was from one-half to three-quarters of an inch, and no injury to the building, and that it could not be noticed unless examined closely: that he put in the building things not called for by the specifications, and that he changed the size of some of the timbers by order of the defendants: that one of the trustees worked at the building for the plaintiff, and that he heard of no complaint until the day for payment.

Several witnesses, among them two carpenters who worked on the building, and two others who examined the work, were called and testified generally to the good character of the work and materials.

One other witness said that after the work was done, except the painting, he had a conversation with one of the trustees, who made no complaint, but said that he thought they were going to have a pretty good school house; he said he did not think it a very good job or finished in a good workmanlike manner; he said, however, that he never inspected the building.

At the close of the plaintiff's case the defendants' counsel objected that the plaintiff could not recover on the first count, as the instrument produced could not be treated as the covenant of the defendants; and that the plaintiff failed on the common counts, as there was no acceptance of the work.

On the defence the three trustees gave evidence, who testified generally that the building was not completed in a workmanlike manner: that it was defective, and not built of proper material: that they had made the plaintiff a conditional offer, that if he would put in additional abutments and put on another coat of whitewash they would pay him \$650. It appeared from their testimony that the plaintiff had put in all the abutments shewn in the plan.

Three carpenters were called, who said they had examined the building, and they stated in general terms that it was not built as it ought to have been done, nor of the proper kind of material, and that it was not done in a workmanlike manner, pointing out what they considered defects; and they were of opinion that \$100 ought to be deducted from the contract price.

The learned judge, on the evidence, found for the plaintiff for the full amount claimed, \$311.

During Michaelmas Term (21 November, 1873) *Robinson*, Q.C., obtained a rule *nisi* to enter a verdict for defendants, or for a new trial, on the ground that the verdict was against

law and evidence: that the covenant declared on was not proved, and that the building was not finished in accordance with the covenant; and that there was no evidence of acceptance of the school house by defendants, or any evidence sufficient to render them liable.

During Easter term (30th May, 1874,) *M. C. Cameron*, Q.C., shewed cause. The case of *McDonald v. Clarke*, 30 U. C. R. 307, is an authority for the plaintiff succeeding here. The contract sufficiently shews who the parties were. It appears to be signed by the school trustees, and it relates to building a school house. The verdict can also be supported on the count for work and labor. The house was built, and no complaints were made during its erection. Two instalments, \$400, were paid.

C. Robinson, Q.C., contra, As to the construction of the instrument, *McDonald v. Clarke*, 30 U. C. R. 307, does not apply. In that case, by looking at the document one could see the two parties. This is simply the case of a deed purporting to be *inter partes* with no parties mentioned in it, and they cannot become parties to it either by their signatures alone or by their conduct: *Addison* on Contracts, 7th ed., 31; *Dicey* on Parties to Actions, 103; *Chesterfield and Midland Silkstone Colliery Co. (Limited) v. Hawkins*, 3 H. & C. 677; *Reeves v. Watts*, L. R. 1 Q. B. 412; *Sunderland Marine Insurance Co. v. Kearney*, 16 Q. B. 925, 928. On the merits the defendants should succeed. They have refused to take the key, and have never used the school-house. They would not have been justified, as trustees, in accepting the building or paying the contract price. The disinterested witnesses all said the work was not well done, and the plaintiff's witnesses who said otherwise, were interested. With regard to acceptance, the school-house is on defendants' land, who have done nothing to accept, and the common counts, therefore, do not apply. Payment cannot make a contract under seal, nor imply acceptance under the facts proved here. He cited *Hamilton v. Myles*, 23 C. P. 293; *Behn*

v. *Burness*, 3 B. & S. 751, and notes; *Munro v. Butt*, 8 E. & B. 738; *Smith v. Brady*, 17 N. Y. 173; *Shaw v. Lewistown and Kishacoquillas Turnpike Road Co.*, 3 Penn. 444.

December, 22, 1874, MORRISON, J., delivered the judgment of the Court.

The instrument produced at the trial, and upon which the plaintiff relied to support the first count in his declaration, and which was in fact the contract between the parties, is certainly inartificially drawn, although no doubt at the time well understood by the parties who put their names and seal of the defendants to it.

It is headed, "Specification of a school house in school section No. 4, Tilbury East." Then follows in detail the size of the building, and the details of the work and materials to be employed, and the fitting up of the interior of the school house.

It did not refer to any plan, but the defendants furnished the plaintiff with a plan, which was produced at the trial, and after stating how it was to be painted, the instrument ended as follows: "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration, the parties of the first part agrees to pay the party of the second part the sum of seven hundred and eight dollars of lawful money of Canada; one half on the 15th day of May, and the other half when the said school house is completed. Underneath is the seal of the defendants with impression on it: "Tilbury East S. S. No. 4," with the names of the three trustees opposite it, and below that again the signature of the plaintiff.

It bore no date, but from the evidence it was executed by the parties about the 1st March, 1873.

It seems to us very clear upon the face of the instrument itself, its terms, the position of the seal of the defendants affixed to it, and the other signatures, who are meant and who are designated as the parties of the first part, and the party of the second part, viz., the defendants

as the former and the plaintiff as the latter. It is quite apparent from the whole instrument that it was intended to operate as a covenant on the part of the defendants, whose seal was affixed to it, as well as the signatures of the members of the corporation, and delivered by them to the plaintiff as such.

But independent of all this, the parties subsequently acted upon it and recognized it as their contract, paying to the plaintiff \$400 of the amount mentioned in the agreement; and upon the authority of *McDonald v. Clarke*, in this Court, 30 U. C. R. 307, and the principles upon which that case was decided, it is sufficiently clear from the instrument itself, the acts of the parties and the facts appearing at the trial, that the defendants are the parties covenanting with the plaintiff, and that it was the intention of both parties that the instrument should so operate.

That being so, the evidence given at the trial supports the finding of the learned Queen's counsel who tried the cause. The contract price was \$708; \$400 was paid by defendants, leaving a balance of \$308 due on the contractor, for which the learned Judge entered a verdict.

We assume that he found that the plaintiff had fulfilled his contract. We cannot say but that there was evidence to support the verdict. If the learned Judge believed the plaintiff and his witnesses, there certainly was, for they testified in effect that the building was completed according to the specifications and plan except where varied by the defendants, and that the work was done in a workmanlike manner and of the proper materials, in fact that the plaintiff performed more work than he was required to do, and any defects were of a trifling character. On the other hand, the trustees testified, as well as some carpenters who examined the building, that the work on it was not done in a good workmanlike manner, and that the materials were not of the kind that ought to have been used, and they referred to what they considered various defects, and in their opinion \$100 ought to be deducted from the contract price.

It did appear that after the work was finished the trustees complained of defects, and they offered to settle with the plaintiff if he would consent to a deduction of \$58, (*i. e.*, paying him \$250), the plaintiff putting in some additional abutments which were not shewn on the plan. This the plaintiff declined to do.

It is just one of those loose, defectively drawn contracts, open to all kinds of objections and disputes, and if the parties are of a litigious spirit necessarily leads to useless litigation.

If the learned Judge had reduced the amount of the claim by \$75 to \$100, I might, from reading the evidence, be better satisfied; but if the Judge who heard the witnesses was satisfied that the plaintiff substantially performed his contract, we can see no ground upon which we ought to interfere with his finding.

Rule discharged.

CAWTHRA ET AL., EXECUTORS OF MILLS, V. HAMILTON
AND LAKE ERIE R. W. CO.

Railway arbitration—Notice of desistment—C.S.C., ch. 66, sec. 11, sub-sec. 16.

In an arbitration under the Railway Act, Consol. Stat. C., ch. 66, to determine the value of land taken, two of the arbitrators had agreed upon the sum to be awarded, and notice had been given by them to the other arbitrator on the 27th February, that they would meet on the 1st March to sign the award. On the 27th a notice of desistment, and that a new notice would be given, was served on them, and on the 1st March a new notice was given, but the two arbitrators proceeded notwithstanding, and made their award.

Held, that the notice of desistment was effectual, and the award void.

DECLARATION on an award, which set out that the defendants entered into an arbitration to ascertain the damages sustained by Mills, the testator, (who died after the this action commenced), in consequence of the defendants taking certain lands, in pursuance of the Railway Clauses Consolidation Act; the appointment of three arbitrators;—John Webber, Joseph Lister, and Dennis Moore—and that a majority of them, the said Joseph Lister and Dennis

Moore, on the 1st day of March, 1873, made their award in writing, and assessed the value of the land, &c., at the sum of \$3,000, which sum the two arbitrators directed to be paid by the defendants to the testator, Mills, &c.

Pleas—1. That the lands taken by the defendants were taken by them for the purposes of their railway, under the provisions of their special Act and the Railway Act, and that acting in pursuance of the Act, the defendants caused a notice to be served on the testator in the terms thereof, containing a description of the lands, &c.: and the name of a person, the said John Webber named in the declaration, as the arbitrator of the defendants, &c.: that the testator named an arbitrator, &c.: and that the two arbitrators appointed a third arbitrator: that before the arbitrators, or any two of them, had made an award, the defendants, in pursuance of the Railway Act, gave notice to the testator that they (the defendants) desisted from the said notice, and at the time thereof gave new notice, with regard to the same lands, to the testator, in the terms of and in accordance with the provisions of the Act, containing a description of the said lands and a readiness to pay the sum of money therein mentioned, &c.: that in pursuance of such notice they (defendants) desisted from all proceedings under the said first mentioned notice, and did proceed in the manner directed under the said Railway Act upon the notice so secondly given, and such proceedings were thereupon had that after the expiration of the time thereby limited for the testator to appoint his arbitrator, &c., the Judge of the County Court, &c., appointed a sworn surveyor, to wit, one Orpheus Robinson, to be the sole arbitrator, &c., who awarded \$1,600 as the compensation to be paid to the testator for such land and damages, which sum was thereupon tendered to the testator: that after such desistment, and after the said Joseph Lister and Dennis Moore had notice thereof, and after such new notice was given as aforesaid, the said Joseph Lister and Dennis Moore, in the absence of the said John Webber, proceeded with the reference and made the said pretended award in the declaration mentioned.

2. That before making the award, defendants revoked the submission.

3. On equitable grounds, that the sum awarded was excessive and fraudulently exorbitant, and in opposition to the whole of the evidence taken before the arbitrators in relation thereto.

4th. That the testator did not, before the commencement of the suit, make, execute, or deliver to them (the defendants) any deed or conveyance of the land, in respect of which the award was made.

The plaintiffs joined issue on the several pleas, and replied to the first plea: that the notice to the testator that the defendants had desisted, was given to the testator after, and not till after, the arbitrators had entered upon the reference, had heard all the evidence adduced, or intended to be adduced, by both parties to the arbitration; had heard all the arguments of counsel for the parties; had deliberated as to the amount of the award; had decided the same; and had announced their decision to the parties; and after the majority of the arbitrators who made the award met, at a time and place of which the remaining arbitrator had at least one day's clear notice.

Second replication: that the notice of desistment in the plea mentioned was given by the defendants after the proceedings had been taken as in the preceding replication mentioned, and was so given fraudulently and vexatiously, and for the purpose of preventing the award being formally made, and for no other purpose whatever.

Third replication to the third plea: that the defendants did not, before the making of the alleged award, revoke the submission and reference, otherwise than by the notice that they had desisted, as in the second plea mentioned; and that such notice was only given after the proceedings mentioned in the second replication had been had; and that such notice was fraudulently and vexatiously given, &c.

Second replication to the fourth plea: that the defendants ought not to be permitted to plead the said plea, &c.,

because the plaintiffs say that they were ready and willing, &c., to make, execute, and deliver to the defendants a deed or conveyance of the land in respect of which the award was made, of which defendants had notice; but defendants afterwards served the notice that they had desisted as in the first plea alleged, and refused to accept any deed or conveyance from the plaintiff, and exonerated the plaintiffs from giving the same.

Rejoinder to the second replication to the first plea: that though true it is that the notice of desistment was so given after the arbitrators had entered upon the reference and had heard the evidence, yet they had not, at the time such notice was given, decided on the award or announced the same to the parties; nor had the majority of the arbitrators, who made the award, met at a time and place of which the other arbitrator had notice, as in the replication is mentioned.

On the remaining replication issue was taken.

The plaintiff surrejoined, taking issue on the second part of the first rejoinder.

The case was tried at the Spring Assizes, 1874, at Hamilton, by the County Judge of Wentworth, sitting for Richards, C. J.

Upon the trial the reference and award set forth in the declaration, and in the first plea, and the notice to arbitrate, certificate, and other preliminary steps set forth therein were admitted. It appeared that Joseph Lister and John Webber were the arbitrators, who appointed Dennis Moore as the third arbitrator: that having proceeded with the reference and examined witnesses, a notice, signed by Lister and Moore, was served on the other arbitrator, Webber, on the 27th of February, that the arbitrators would meet on the 1st of March, at an hour and place mentioned in the notice, for the purpose of signing the award: that on the same day 27th of February, a notice of desistment was addressed to Mr. Mills and the three arbitrators by name, as follows: "You are hereby required to take notice that the Hamilton and Lake Erie Railway Company desist

from proceeding under the notice for lands required by them, as shewn in the diagram served with the notice in this matter on you, the Hon. Samuel Mills, and will give a new notice concerning the same ; and the said Company hereby offer to pay any costs that may have been incurred by reason of the said notice having been given."

This notice was signed by the Secretary of the defendants' company, and dated 24th of February, 1873.

On the 27th of February a copy of the notice was served on the arbitrators Lister and Webber, and on Moore on the 28th February, in the presence of Mr. Mills and Mr. Lister. It was admitted that the notice of desistment, and a new notice, and a certificate with regard to the lands mentioned therein, were served on the 1st of March, at the hour of 11.15 a.m. : that on the 1st of March two of the arbitrators, Lister and Moore, met at the place and time mentioned (3 p.m., at the Wesleyan Female College), and signed the award sued on, the other arbitrator, Webber, not being present. Such arbitrator stated in his testimony that he did not attend the meeting because he thought it of no use to do so, as he had been served with the notice of desistment.

It appeared also, from the evidence given at the trial, that two of the arbitrators had agreed upon the amount of \$3,000 the amount awarded, the other arbitrator dissenting from that valuation as being too high, and when they last met, before the day the award was signed, it was agreed that notice should be given when they were to meet, so that all might be present when the award was to be signed. From the evidence of the arbitrators, it appeared that the highest value put on the land by the witnesses examined before the arbitrators was not over \$1,800 ; before the award was made there was nothing in writing to fix \$3,000 or any other sum as the amount of the award.

It also appeared that the defendants proceeded under the new notice according to the provisions of the statute, the plaintiff refusing to appoint an arbitrator. The Judge of the County Court appointed a sole arbitrator, who made

his award on the 19th of April, awarding \$1,600 as compensation, which amount was tendered to the testator and refused by him.

It was admitted, as a matter of fact, that no deed was ever executed or tendered to the defendants, as alleged in the fourth plea.

A verdict was entered for \$3,198, with leave reserved to defendants to move to enter a nonsuit or verdict for them, the Court to be at liberty to draw inferences as a jury.

In Easter Term last (21st May, 1874,) *Burton*, Q.C., obtained a rule *nisi* accordingly, on the grounds that the plaintiffs were not upon the law and evidence entitled to recover, because a notice of desistment, in the terms of the provisions of the Railway Act, was duly served before the making of the award sued on, and two of the arbitrators proceeded to make an award in the absence of the third, and because no deed was made, executed, or delivered before the commencement of this suit; and that upon the issues proved or admitted the defendants were entitled to succeed.

During this Term (28 November, 1874,) *Harrison*, Q.C., shewed cause. There should be some analogy in giving notice of desistment to giving notice of revocation of a submission to arbitration. Recent legislation has modified the power of revocation, and this power to desist should be construed strictly. It is manifestly unjust to the plaintiffs to put them to the loss of the time and trouble of a new reference when the determination had been arrived at by a majority of a Court of the defendants' own choosing. He referred to C. L. P. Act, secs. 176, 179; *Morgan v. Metropolitan R. W. Co.*, L. R. 4 C. P. 97; *Grimshawe v. Grand Trunk R. W. Co.*, 15 U. C. R. 224; *McLean v. Great Western R. W. Co.*, 15 U. C. R. 198; *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222.

J. H. Cameron, Q.C., with him *Walker*, contra. The plaintiffs are in the same position as when the notice to arbitrate was served, except as to costs, and as to them the defendants are liable. The company has exercised no

unusual power, merely the same power of revocation which every individual had before the C. L. P. Act. There is nothing to prevent a nonsuit. It is admitted the notice of desistment was given before the award was signed. The plaintiffs cannot recover as for the value of the land, because they have not shewn they have made title : *Guardians of the East London Union v. Metropolitan R. W. Co.*, L. R. 4 Ex. 309; *Laird v. Pim*, 7 M. & W. 474. They also cited *Everard v. Paterson*, 6 Taunt. 625; *Henfree v. Bromley*, 6 East 309.

December 22, 1874, MORRISON, J., delivered the judgment of the Court.

The principal question arising on this rule is, whether the defendants had a right to give the notice of desistment at the time and under the circumstances appearing in the evidence taken at the trial, and by so doing terminated all further proceedings under the defendants' first notice and the arbitration pending in pursuance of such first notice.

It seems to me that, upon the authority of *Grimshawe v. The Grand Trunk R. W. Co.*, 15 U. C. R. 224, the defendants are entitled to our judgment. That was a case somewhat similar to the one before us, and arising upon the same sub-section 16 of section 11 of the General Railway Act, Consol. Stat. C., ch. 66. There the arbitrators that had been appointed had taken the oaths required by the statute, had met, and had adjourned their sitting till a future day; and on that day the Railway Company served a notice of desistment, and a new notice was given for the same lands.

Sir John Robinson, C. J., in giving judgment said, at p. 234: "It is very clear that we cannot deny that the notice given under our general act can be recalled, for the language on that point is perfectly explicit."

And, after referring to considerations that may have influenced the Legislature in making such a provision, &c., says, at p. 235: "They (the Company) desired, no doubt, and have not disavowed it, to submit the matter to other

arbitrators, because they were not content with those who have been chosen. Can they then, as a matter of right, and under a fair application of the statute, attain that object? I do not think we can decide otherwise. The position in which the 16th sub-section stands in the 11th clause makes it evident, I think, that it was meant the discretion might be used after all the arbitrators had been appointed, and they had entered upon their duties."

A portion of the judgment I have cited meets the suggestion and contention of the plaintiffs' counsel, viz., that these defendants, anticipating an award which, in their opinion, was exorbitant and not justified by evidence, desisted so as to avoid their making an award.

Grimshawe v. Grand Trunk R. W. Co. being a binding authority upon us and recognized as such in *Re Widder and The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222, is there anything in the circumstances of this case distinguishing it in principle from *Grimshawe's* case? It was pressed upon us that two of the arbitrators had made up their minds at one meeting as to the compensation they considered the plaintiff was entitled to have, and that a future meeting was called merely to give effect to their intention and for the signing of the award; and it was argued that it was in effect the same as making the award, and by doing so they had made an award; and that the notice of desistment and new notice given in the interval of such meetings ought not to prevail; but it is quite clear, that in point of law and fact no award was made at the time the notice of desistment was given.

It is evident from the 19th, 20th and 23rd sub-secs. of sec. 11 of the Railway Act, the award must be in writing.

By sub-sec. 23, in certain cases it is to be delivered to the clerk of one of the Superior Courts, and it becomes the title of the company to the land therein mentioned; and by the 11th sub-sec. it is provided that the award of the arbitrators, or any two of them, shall be final, but that no such award shall be made, or any official act be done by such majority, except at a meeting held at

a time and place of which the other arbitrator had at least one clear day's notice. Such a notice was here given; but in the interval the notice of desistment was given, and the further new notice given as to the lands.

Independent of this provision, the general rule is, that up to the moment before signing the award, the arbitrators have the right to change their opinions, and no award can be said to be made until then, it being a judicial act, and the parties have a right to the exercise of the arbitrators' judgments until the entire completion of the award.

And in *Russell on Awards*, 4th ed., 234, it is laid down, "So far as the validity of the award is affected, it will in general be considered as 'published' as soon as the arbitrator has done some act whereby he becomes *functus officio*, and has declared his final mind, and can no longer change it—that is, as soon as he has made a complete award."

Here, until the signing of the award the arbitrators could have changed their minds, and the award was not made or completed until the arbitrators met in pursuance of their notice and signed the award. Here the award was not made at the time of the notice of desistment, and, as held in *Grimshawe v. The Grand Trunk R. W. Co.*, 15 U. C. R. 224, the act of the arbitrators in going on and making an award after the notice had been "desisted from," to use the phraseology of the Statute, was a void act; and the defendants are entitled to their rule being made absolute to enter a nonsuit.

It becomes unnecessary to consider the other question raised as to the tender of a deed, for that rests upon the award being a valid one.

Rule absolute for nonsuit (a).

(a) See *Mitchell v. Great Western R. W. Co.*, ante pp. 148, 159.

IN RE WEBSTER AND THE CORPORATION OF THE
TOWNSHIP OF WEST FLAMBOROUGH.*Road allowance—Deviation from—By-law to open.*

An original allowance being impassible at one point, owing to ravines, &c., the road commissioners, about seventy years ago laid out the road a little to the north, where it had since been used as the highway. It did not appear that the owners of the lots over which it passed got any compensation for their land thus taken, and they had had possession ever since of the original allowance, which it was alleged had been given to them in lieu of such land. Under these circumstances, the Court, following *Re Burritt and the Corporation of Marlborough*, 29 U. C. R. 119, quashed a by-law to open the original allowance.

In Michaelmas term, (3rd December, 1873,) *F. Osler* obtained a rule *nisi*, on the application of Joseph Webster, to quash by-law 228 of the township of West Flamborough, to open up the original allowance of road lying opposite No. 11 and part of No. 10, in the 1st and 2nd concessions of the township, for illegality, on the following grounds:—1st. That the by-law is bad for uncertainty in not defining and particularizing the line of road intended to be opened, nor the width thereof, and that there is no such road as answers the description in the by-law; 2nd. that a travelled road, instead of the original road allowance, having been laid out on lot No. 11 sufficient for the purposes of a public highway, and for which no compensation was paid to the owners of land appropriated for said highway, the said Joseph Webster and other owners of the land appropriated for such highway are entitled to the original allowance in lieu of the road so laid out; and the said Webster being entitled to the original road allowance, the said by-law to open the same and deprive him of his property is illegal; 3rd, the opening of the said allowance would greatly inconvenience the said Webster, and would depreciate the value of his property; that the said allowance is unfit for the purposes of a highway, and a proper road could not be constructed thereon, and the highway now travelled is a good and sufficient one; 4th. that the said allowance for road runs through the orchard of the said Webster, and improperly

and illegally authorizes an encroachment on said orchard without the consent of the owner, contrary to the statute; 5th. that the said by-law prejudicially affects the rights of the said Webster, and until quashed would be a bar or impediment to the assertion of such rights, and to a fair trial of the same in a court of law or equity, and should therefore be quashed; and upon grounds disclosed in affidavits and papers filed.

The by-law was as follows: "By-law 228 of the township of West Flamborough, to open up the original road allowance lying opposite lot No. 11 and part of lot No. 10, in the first and second concessions of said township of West Flamborough: Whereas, James Hamilton, John Tunis, and others have made application to the municipal Council of the township of West Flamborough to open that portion of the second concession line in said township lying opposite lot No. 11 and part of lot No. 10, in the first and second concessions, otherwise described as follows: Commencing at the residence of the late William Bullock and extending in an easterly direction to the brow of the ravine commonly called the 'ravine below the falls;' And whereas, due notice of the said application has been given according to the Statute, * * Be it therefore enacted by the municipal council of, * * that the said road allowance above mentioned and set forth be and the same is hereby opened."

The following appeared to be the facts: It was clear from the affidavits, that about seventy years ago, at the early settlement of the township, the western portion of the first concession was opened and laid out by commissioners as part of a leading public road, and known then as, and still is called, the York road, communicating with the road to York, now Toronto: that such road was laid out as far as lot No. 10, on this concession line: that at this point the original allowance now in dispute being impassable and inaccessible owing to deep ravines and gorges, the line of road, instead of continuing along the concession line, was by the commissioners diverged to the

north several rods, and then laid out almost parallel to the original allowance across the lots in that concession. The road was thus laid out, and was used, and still is used, as the main public highway. It was alleged by the old settlers, and sworn to, that this road which the commissioners so laid out and made, was laid out in lieu of the original allowance, and that the owners of the lots whose lands were taken without other compensation, were told by the commissioners they were to have the original allowance in lieu of, and as compensation for, their lands so appropriated; and that under these circumstances, and since that period, they took possession of the respective portions of such original allowance opposite their lots, and have used it and dealt with it as their own property, and as a portion of these lots, and from that period to the present time they have so enjoyed it.

It did not appear that the owners got any other lands as compensation for their lands so taken.

In Trinity term last, (3rd September, 1874.) *T. Robertson* Q.C., shewed cause. There is no sufficient evidence that the road which has been in use was laid out in lieu of the original allowance for road, or that the portion opened of the original allowance was given as compensation for land taken for the travelled road. *Re Burritt and the Corporation of the Township of Marlborough*, 29 U. C. R. 119, will be relied on by the applicant, but the facts of that case and this are not parallel. He referred to *Winter v. Keown*, 22 U. C. R. 341.

F. Osler, contra, relied on *Re Burritt and The Corporation of the Township of Marlborough* above cited. It is sworn to by the old settlers that the original road allowance was given by the road commissioners, in lieu of other land taken, to the then owners of the land. The facts also afford a strong presumption to the same effect. He cited *Re McMichael and the Corporation of the Township of Townsend*, 33 U. C. R. 158; *Purdy v. Farley*, 10 U. C. R. 545.

December 22nd, 1874, MORRISON, J., delivered the judgment of the Court.

It is very difficult, from the mass of affidavits filed on both sides, some forty in all, many of them of very considerable length, to arrive at any satisfactory conclusion as to the true state of the matter in dispute. The affidavits are very conflicting in any point of view.

The by-law which is attacked is for the opening of a small portion of the original allowance in the first concession—in fact, for a distance little over the front of one lot—and which, it is alleged on the part of the applicant, never had been opened.

It is not alleged that the owners of these lots got any other compensation for their lands so taken.

As said by the learned Chief Justice of this Court in *Re Burritt and The Corporation of the Township of Marlborough*, 29 U.C.R. 119, the fact of the undisputed possession of the original allowance for so long a period, seventy years, in this case, with the other fact that a leading highway, which would have otherwise passed on the original allowance, diverged on account of difficulties in the way, and then crossed the lots, would well warrant a jury in coming to the conclusion that the travelled road was opened and acquired by the public in place of the original allowance.

The affidavits filed on the part of the applicant are very strong, and preponderate in favor of his contention.

Much of the matter contained in the affidavits filed it is not necessary to consider in the view we take of the case such as the practicability or impracticability of opening or using the portion directed to be opened; its uselessness or advantage when opened; or whether the applicant was induced to purchase the property upon the representations of the parties now promoting the by-law, that the original allowance formed a portion of it; or whether the municipal council, in passing the by-law to open the line across one lot, was merely lending their authority to promote a private speculation. All these matters are beside the main question, which is, are the municipal corporation the owners of the original allowance?

If they are, then they are entitled to the use of any portion they may deem expedient, and to expend any amount uselessly if they think proper.

The question for our determination is, whether it is reasonable under the circumstances that the municipality should be allowed to adopt this summary way of disposing the applicant of the portion of the road allowance he is in possession of, and which it is asserted that seventy years ago was given to the proprietors whom he claims through in lieu of other land taken from them for the public highway, which runs a few rods in the rear of the allowance.

The travelled road, which was so laid out and opened, was not one opened by the settlers for their own convenience some seventy years ago, as was contended in *Burritt's* case, but a road laid out for the use of the public by public commissioners, and taken in lieu of the original allowance as alleged, and on account of the impracticability of opening it beyond lot No. 10.

After carefully reading over the affidavits, and considering the fact of an apparent acquiescence of seventy years, we are of opinion that we should follow and adopt the course taken by this Court in *Re Burritt and The Corporation of the Township of Marlborough*, 29 U. C. R. 119, a case somewhat similar in the circumstances to this, and make the rule absolute.

If the contention of the municipality is right, it is not without remedy; for if the road now in question has been opened and used as a public highway, as asserted in several affidavits filed on the part of the municipality, we take it they may proceed by indictment against the parties who are obstructing it.

If, on the other hand, it never was opened, and the municipality are the owners of it, and their right is disputed, as said in *Burritt's* case, the ownership can be tested in such a way that the facts may be brought out before a jury, and the law settled by the Court, with a right to the parties to appeal.

We think the by-law should be quashed with costs.

Rule absolute.

KILMER V. GREAT WESTERN R. W. CO.

R. W. Company—Obligation to fence.

M., the owner of land adjoining a railway, took down the fence separating it from the track, with the assent of the Railway Company, in order to supply them with wood cut upon the land. He then sold the land to one C, stipulating that he should retain one or two acres on which this wood was piled. C. afterwards leased the east half of the land to the plaintiff, containing part of the land retained by M., and C. allowed the plaintiff's cattle to run on the west half, there being no line fence between the two halves. The plaintiff's cattle escaped from this west half on to the railway where the fence had been removed by M., and were killed.

Held, that the plaintiff could not recover, for the facts shewed a license by implication from C. to leave the fence as it was, and the plaintiff, as C.'s licensee, could have no better right than C. *Held*, also, that as the fence was originally removed with the assent of the parties interested in it, the defendants could not be liable without a notice to erect it from some one duly authorized, of which there was no evidence.

THIS was a County Court case tried at the Assizes.

Declaration: for not erecting and maintaining fences of the height and strength of an ordinary division fence on each side of the defendants' railway passing through lot 28, in the 8th concession of the township of Malahide, for the use of the proprietors thereof, by reason whereof two steers and a heifer of the plaintiff, being on the lot with the leave and consent of the proprietor thereof, escaped therefrom and strayed on the defendants' railway, and one of the steers was there killed, and the other steer and heifer were injured by being run against by a locomotive steam engine and train or carriages of the defendants.

Plea, not guilty, by Statute.

The cause was tried at St. Thomas, at the last Spring Assizes before Morrison, J.

The following facts were proved :

The plaintiff was sworn, and said,—In June, 1873, I was in possession of the east half of this lot. On the 10th of July I had two steers and a heifer in a field adjoining the railway. There was no fence between the railway for about twenty rods along the line. One of the cattle was killed and two were injured. They got on the railway crossing from the twenty rods being unfenced on the line.

Cross-examination. I did not see them get on the track. They got on it from the north part of the lot. There was wood along the track in piles about eight feet high. The fence was taken away to allow the parties to cut up the wood, and the fence did not come close to the wood pile. The fence was taken away, and the place was made into a wood-yard. There were gaps in the wood pile, and there was a gap in the pile at my field. I saw cattle tracks through the gap and other places, and at the end of the wood pile. The wood pile did not come up to the fence, nor was it flush with the fence; and I think the cattle got out between the end of the wood pile and the fence on the west side. That is Crysler's side of the lot. There was no fence between us.

Re-examination. I call the pile of wood a wood-yard, and it was partly piled in front of my lot and Crysler's. I was not aware till 10th July that cattle could get on to the track, and they could get on either from my lot or Crysler's; there was no line fence. It was understood between us that our cattle could run on each other's land. On the 11th July a fence was put up. The wood pile was about ten or fifteen rods in front of my place; and the fence was torn down and a gap left between the pile and my fence. The fence was torn down to allow them to use the sawing machine. I saw them doing it, and it remained down until the injury. I cannot be positive the cattle got out at any particular place. The arrangement between Crysler and myself, as to having no line fence, was made on the 9th June. I got a lease from Crysler, of my part of the lot, executed on the 15th June. I was to pay \$80 a year. It was worth that to me to let my cattle run on the place. It was fenced on one side. Crysler's cattle came to the place a week after it was agreed our cattle should run together on the 80 acres on the lot. I live on the adjoining lot.

There was other similar evidence given as to the state of the wood pile, fences, and gaps.

Wm. McMillan.—I formerly owned this lot. I cut

timber on it and supplied it to the defendants. I contracted to deliver it to them. I sold the lot in the beginning of June to Crysler, and conveyed it to him. I was using about two acres for a wood yard adjoining the railway; was using it at the time of the sale. I had wood on it. I stipulated with Crysler to be allowed to retain one or two acres for a wood-yard, but it was not reduced to writing until about three months ago; but I remained previous to that in possession under the verbal agreement from Crysler for the part where my wood was lying next the track, and the fence next the track was taken down for my convenience. I never was notified to remove the wood by any one, and I have still wood on it.

Cross-examination. I went for a lease to Crysler for the company dated 14th March, 1874. I had no authority to ask for the lease.

The defendants' counsel contended the defendants were not liable, because McMillan was the adjoining proprietor as respected the railway; and as the fence was down by his consent and for his convenience, the plaintiff could not recover.

The learned Judge reserved leave to the defendants to move to enter a verdict for them if the Court should be of opinion the plaintiff should not recover. He found that the cattle went through the gap in the wood pile; and he found a verdict for the plaintiff and \$70 damages.

In Easter term last, (22nd May, 1874,) *M. C. Cameron*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered on the leave reserved, on the grounds:

1. That there was no liability or duty on the defendants, as respects the plaintiff, to maintain a fence between the railway and the land from which the cattle strayed.

2. That the fence was removed by the proprietor of the land from which the cattle strayed, and at his request it was not maintained by the defendants; and such removal and non-maintenance were acquiesced in by the plaintiff and those through whom he claimed.

3. That the fence was not maintained at the request and instance of the person in legal possession of the land from which the cattle escaped upon the railway.

Or to shew cause why the verdict should not be set aside, and a verdict entered for the defendants, upon the evidence and upon the grounds above stated; or why there should not be a new trial on the ground that the verdict was contrary to the evidence and the weight of evidence.

During this term, (26th November, 1874,) *Robinson*, Q.C., shewed cause. The reservation made by McMillan when he sold the lot to Crysler gave him at most the right of a tenant at will, which right was put an end to by the lease made by Crysler to the plaintiff of the east half of the lot in June, and by the leave and license, or right and interest, which Crysler gave the plaintiff, allowing his cattle to run and pasture upon the west half of the lot. It may be that McMillan took down the fence and piled the wood where it was placed while he was owner of the lot; and that the fence remained down, and the wood continued where it was, after he sold the land to Crysler, and after Crysler leased and gave the license or right to the plaintiff; and that both Crysler and the plaintiff took their titles with a knowledge of these facts, and had such knowledge until the time of the accident; but that will not relieve the defendants from putting up the fence as against and for the protection of Crysler, the purchaser, and of those who claim under him: *Gillis v. Great Western R. W. Co.* 12 U. C. R. 427; *Connors v. Great Western R. W. Co.* 13 U. C. R. 401; *Brown v. Grand Trunk R. W. Co.* 24 U. C. R. 350; *Studer v. Buffalo and Lake Huron R. W. Co.*, 25 U. C. R. 160; *Clayton v. Great Western R. W. Co.* 23 C. P. 137; *Wilson v. Northern R. W. Co.*, 28 U. C. R. 274. A tenancy at will is determined by a lease for years made by the lessor to a third person, although it is agreed between the lessor and lessee for years that the lessee for years shall not enter on the land till after the day on which the rent of the lease at will was due: *Dinsdale v Hles*, 2 Lev. 88, Sir T. Raym. 224.

Barker supported the rule. The cattle escaped, not from the east half of the lot, which the plaintiff had leased from Crysler, but from the west half, which was in Crysler's occupation. The license he had from Crysler, to pasture his cattle on the west half, gave him no right as an adjoining proprietor to make the railway fence their ground, especially when the west half was so unprotected that it was common to all cattle; and this land was without any fence on the north side along the concession line: *Auger v. Ontario, Simcoe, and Huron R. W. Co.*, 16 U. C. R. 92; *McIntosh v. Grand Trunk R. W. Co.*, 30 U. C. R. 601. McMillan, the former owner of the land, took down the fence, and the defendants were not obliged to replace it,—not until requested to do so at any rate, and no request was ever made; and the plaintiff took his lease and right of pasturage subject to the state of things existing at the time he acquired his right from McMillan: *Clayton v. Great Western R. W. Co.*, 23 C. P. 137. The following cases shew that verbal agreements made as to acts to be done on land, or as to rights to be exercised upon land, are valid contracts: *Morgan v. Griffith*, L. R. 6 Ex. 70; *Lindley v. Lacey*, 17 C. B. N. S. 578; *McGinness v. Kennedy*, 29 U. C. R. 93; *Noble v. Spencer*, 27 U. C. R. 210.

December 22nd, 1874, WILSON, J.—It may be taken as settled law, from the number of decided cases, that the defendants were bound to fence their line of way only against the owners and proprietors of the adjoining land, and the occupiers of such adjoining land who are entitled to have their cattle there with the owner's assent.

The case of *Auger v. Ontario, Simcoe, and Huron R. W. Co.*, 16 U. C. R. 92, has restricted this general declaration of law. For when the person claiming by leave of the owner to have his cattle on the adjoining land has no more benefit, although he pays something to the owner for the right, than all others have who pay nothing for it, by reason of the land being open and unenclosed land, the

licensee has no remedy against the railway company for not fencing as against him.

That case means, I presume, that the land should be unprotected by a fence along the line of railway. For if the whole extent of railway were fenced off from the adjoining lands, it should be no defence to the railway company that the rear of the adjoining land was not fenced, and that all stray cattle found their way on to it,—if a person who had leave to put his cattle there had them injured by reason of the railway fence being down.

In this case the rear line of the adjoining land was open and unprotected, so that any cattle could stray on to the west half of the lot and pasture there as well as the plaintiff's cattle; and the front fence along the west half of the lot was open in several places at the gaps spoken of, from the removal of parts of the wood pile from time to time as it was wanted.

If the front or railway fence were down with the assent of the owner of the land, it can be of no consequence that the plaintiff had license to pasture his cattle upon the west half of the lot, for he must take his right subject to or qualified by the rights which were conceded to the defendants.

But if it were not down with the consent of the owner, the plaintiff, being a licensee for the pasturage of his cattle, will be entitled to recover in this action, although the rear of the lot was not fenced, and other cattle not licensed to be on the land came there and pastured as freely as the plaintiff's cattle.

There is no doubt that the fence was taken down by McMillan while he owned the land in question, in order to get the wood which he cut from the lot hauled to the railway line that it might be conveniently supplied to the defendants; and it may be inferred it was done with the assent of the defendants.

In the beginning of June, McMillan sold the land to Crysler, when it was expressly stipulated between them that McMillan should retain one or two acres for a wood yard,—the land, I presume, on which the wood was then piled,—and McMillan remained in possession of it. That

right or license extended along parts of both the east and west halves.

On the 15th of June, after the right conferred upon or granted to McMillan, Crysler made a formal lease to the plaintiff of the east half of the lot, which it is said put an end in law to the tenancy at will of McMillan, conceding that he was a tenant at will.

That would appear to be so from the case cited in the argument, and from *Turner v. Doe d. Bennett*, 9 M. & W. 643; and it must, I am of opinion, do so as to the whole of the land covered by the demise at will, although only the east half of the lot, containing only a part of the land held at will by McMillan, was demised to the plaintiff.

From that time, the 15th of June, McMillan would be in possession by the mere license of Crysler of the portion of the wood yard which is on the west half of the lot; and the evidence shews that he was in possession of that part of it as much by the license of Crysler as the plaintiff had the right of pasturage over the west half by the like license.

Upon this evidence I am of opinion that Crysler could not have recovered for an injury done to his cattle escaping from the west half of the lot by the gaps in the fence or wood pile, and injured on the railway by reason of the defect of fences; and if he could not maintain such an action the plaintiff cannot do so either, as he claims only by license from the owner. *Clayton v. Great Western R. W. Co.*, 23 C. P. 137, is expressly in point.

The plaintiff's license, which was expressly proved, is no stronger than McMillan's license to be implied from the circumstances; and each licensee must take that which was granted to him by the common grantor, subject to or qualified by the rights of the other.

I am also of opinion, that as McMillan, while owner of the adjoining land, removed the defendants' fence with their assent, they could not be made wrong-doers, as respected himself, for not maintaining the fence without a notice from him to put it up, assuming he could oblige them to erect it at all, while it might be contended the

onus was upon him to replace that which he had pulled down.

And I am also of opinion that if McMillan sold or leased the land, the purchaser or lessee could not treat the defendants as wrongdoers for not maintaining the fence until they were requested by the purchaser or lessee to replace the fence,—or at any rate until the defendants had notice of such sale or lease,—and in either case, until a reasonable time was allowed to them within which to do the work. A mere verbal licensee could not, in my opinion, require the defendants in such a case to replace the fence.

Upon the evidence, I think the plaintiff has failed to shew that he is in the position of a person against whom the defendants were obliged to fence. The defendants were not bound to do so as against Crysler, for the facts show a license by implication to keep the wood piles and fence as they were; and they were not therefore bound to do so as against the plaintiff, who was the mere licensee of Crysler in respect of the west half of the lot, having no higher or better right than the defendants. Each party held his right subordinate to, and modified and restricted by, the right of the other. The plaintiff, therefore, enjoyed his right of pasturage subject to the right of the defendants to have their fence in the condition in which it then was.

I think, also, that as the fence was originally removed with the assent of the parties interested in it, the defendants cannot be liable for not maintaining the fence, under the circumstances, without a notice to erect it by some one having authority to demand it. And as there was no such notice or demand, the case fails for that cause as well.

The rule should be absolute to enter a nonsuit.

MORRISON, J., concurred.

RICHARDS, C. J., did not hear the argument, and took no part in the judgment.

Rule absolute for nonsuit.

REGINA V. HENNESSY.

Larceny in United States—Conviction here—32-33 Vic. ch. 21, sec. 112, D.

The prisoner, being the agent of the American Express Company in the state of Illinois, received a sum of money which had been collected by them for a customer, and put it into their safe, but made no entry in their books of its receipt, as it was his duty to do, and afterwards absconded with it to this province, where he was arrested. *Held*, that he was guilty of larceny, and was properly convicted here under 32-33 Vic., ch. 21., sec. 112, D.

CRIMINAL case reserved.—The prisoner was tried and convicted before Burton, J., at the last York Assizes, under the statute 32-33 Vic., ch. 21, sec. 112, D., for bringing into Canada or having in his possession therein certain property stolen in the State of Illinois, one of the United States of America, in such manner that the stealing or obtaining it in like manner in Canada would, by the laws of Canada, be a felony or misdemeanour.

The indictment contained three counts, one charging him with having stolen the property in a foreign country, and subsequently bringing it into Canada; the second with having so stolen it, and subsequently having it in Canada; and the third for larceny in Canada.

The evidence disclosed that the prisoner was on the 3rd July last the agent of the American Express Company at Winona, in the State of Illinois, and that on that day, at about 2 p. m., one Charles Ames, a grain buyer there—and having a branch house at Long Point, in the same State, at which place one Taggart was his agent,—having occasion to remit to his agent, put up \$700 in United States currency or greenbacks in an envelope, and took it to the office of the said express company at Winona, and delivered the package to the prisoner, who sealed it up, the money having been put into the envelope in his presence, and then sealed up by him, and he gave a receipt for it, and the package so sealed was addressed to the agent Taggart at Long Point, who was at the same time advised by post and telegraph of the money having been sent; and this course of dealing had prevailed for some time previously.

Ames was advised by his agent that the money had not arrived, and he called at the express office, but the prisoner had then left, and he never saw him afterwards, until he was in custody.

The evidence further disclosed, that another parcel had been sent down for collection through the American Express Company at Winona, on some one at Layton, and was sent to the United States Express Company at that place, who collected \$5,720 in greenbacks, and remitted to their agent at Winona, who received it, and handed it to Mr. Dennis, a clerk of the prisoner, in his presence, in the office of the American Express Company; and the United States Express Company got a receipt in the presence of the prisoner for the collection of \$5,720, and the clerk gave the package containing the money to the prisoner, who put it in the company's safe. This was about 11 o'clock, on the 3rd July last.

It was the prisoner's duty to make the entry in the receiving book of all moneys received in packages received for transmission.

The package for \$700 should have been entered, but there was no entry of it, and the \$5,720 should also have appeared in the book, but was not entered.

On the same day the prisoner left Winona on a stock train at 5 p. m., and went through to Toronto, where he arrived on the morning of the 6th, and where he disposed of American currency to the extent of some \$5,000 or \$6,000, and went on to Montreal, where he was arrested.

The jury convicted, and were requested to find, under a charge not complained of, whether the prisoner was guilty of larceny or embezzlement, and found him guilty of larceny.

It was objected that the evidence disclosed, if any offence, that of embezzlement and not of larceny in the foreign country, and that the prisoner could not be convicted on this indictment, which charged him with bringing into Canada property stolen in such foreign country.

The learned Judge sentenced the prisoner to three years' imprisonment in the provincial penitentiary, but at the request of the prisoner's counsel reserved the question for

the consideration of the Court of Queen's Bench. If the Court should be of opinion that the facts proved did not amount to larceny, and that the prisoner could not, under the indictment and the evidence, be legally convicted of bringing goods into Canada as stolen, the prisoner was to be discharged, otherwise the sentence was to be carried out.

The case was argued in Michaelmas term, 25th November, 1874, *Harrison*, Q. C., for the prisoner. The conviction cannot be supported. The question is, what was the design in the original taking—was there an *animus furandi*? We say that none has been shewn. The disposal of the property in Canada cannot affect the question. No stealing has been proved against the prisoner, but only an embezzlement, and the conviction is therefore bad. The prisoner was indicted under 32-33 Vic., ch. 21, sec. 112, D., for larceny of property taken from Michigan, in the United States. *The People v. Williams*, 9 Am. R. 119, 24 Mich. 156, is directly in point; and *Regina v. Thorp*, 1 Dears. & B. 562, and *Regina v. Roberts*, 3 Cox C. C. 74, may also be cited to support our contention. See also *Commonwealth v. Simpson*, 9 Mete. 138, 143.

K. Mackenzie, Q. C., contra. The case of *Regina v. Wright*, 1 Dears. & B. 431, is exactly this case, and supports the prosecution. The evidence plainly proves that the money found in the prisoner's possession was that which had been stolen. That fact is admitted by the prisoner. The sole question is, should the conviction be for larceny or embezzlement? We insist on the third count, *i. e.* for stealing in Canada. He referred to *Regina v. Watts*, 2 Den. C.C. 14; 32-33 Vic., ch. 21, sec. 4; *Roscoe* Crim. Ev., 8th ed., 642, and cases there collected.

December 22, 1874, RICHARDS, C. J., delivered the judgment of the Court.

We have looked at all the cases referred to by Mr. Harrison in his argument, and to some others in which very able judgments were given by Judges in the State Courts of the United States.

It appears that in most of the New England States

which were British colonies before the treaty of 1783, the practice which prevailed before the recognition of the independence of the United States, of indicting offenders who had stolen property in one province and brought it into another, has been continued since the adoption of the Constitution of the United States. But some of these States decline to act on the principle that the bringing of stolen property from another country by the thief into their State constitutes a new taking, so as to make the larceny an indictable offence there.

The general doctrine in our Courts is, that in criminal matters no man is, in the absence of an express law, punishable in one country for acts done by him in another, and the cases cited by Mr. Harrison shew that this in England not only applies to a larceny committed in France, when the thief brought the property into England, but also to larceny committed in the island of Jersey, when the stolen property was brought into an English county.

We suppose the definition of larceny by Grose, J., in *Hammon's case*, 2 Leach 1089, is sufficiently certain, viz., "The felonious taking the property of another without his consent and against his will, with the intent to convert it to the use of the taker."

The doctrine was established long ago that larceny, like every other offence, must regularly be tried in the same county or jurisdiction in which it was committed; but the offence was considered as committed in every county or jurisdiction into which the thief carried the goods, for the legal possession of them still remained in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation.

To this, however, there were some exceptions. If the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry them: 3 *Inst.* 113; 1 *Hawk. P. C.* 151, sec. 52.

A similar exception prevailed formerly when the original taking was in Scotland or Ireland. And it appears to have

been holden that a thief who had stolen goods in Scotland could not be indicted in the county of Cumberland, where he was taken with the goods: *Rex v. Anderson*, 2 East. P. C. 772.

The statute of the Imperial Parliament, 7 & 8 Geo. IV., ch. 29, in effect removed the exception as to larcenies committed in the United Kingdom.

But this did not apply to the case of goods stolen in the island of Jersey, when the thief had them in his possession in the county of Dorset, in which he was indicted and convicted, because the original taking was such whereof the common law could take notice, and the island of Jersey not being considered a part of the United Kingdom, the case was not within the statute 7 & 8 Geo. IV., ch. 29, sec. 76, and so the conviction was held bad: *Rex v. Proves*, 1 Mood. C. C. 349.

So also, as to the island of Guernsey, *Regina v. Debruiel, et al*, 11 Cox C. C. 207.

Felonies and misdemeanours committed within the jurisdiction of the Admiralty are to be tried in those courts, under the provisions of several different statutes.

7 & 8 Geo. IV., ch. 29, sec. 76, Imp., enacted, "That if any person, having stolen or otherwise feloniously taken any chattel * * or other property whatsoever in any one part of the United Kingdom, shall afterwards have the same property in his possession in any other part of the United Kingdom, he may be dealt with, indicted, tried and punished for larceny or theft in that part of the United Kingdom where he shall so *have* such property, in the same manner as if he had actually stolen or taken it in that part."

The section goes on to make similar provision as to receivers of stolen goods.

The Dominion statute, 32-33 Vic., ch. 21, sec. 121, makes provisions to the same effect as those contained in the Imperial statute, 24 & 25 Vic. ch. 96, sec. 114 (a); and as to similar offences committed in any one part of Canada, they may be tried in any other part of the Dominion, where the thief has the stolen property in his possession, in

(a) This section is like sec. 76 of 7 & 8 Geo. IV., ch. 29, above quoted.

the same manner as if the theft had been committed there.

Section 112 of the same Act provides, "If any person brings into Canada, or has in his possession therein, any property stolen * * * in any other country, in such manner that the stealing * * * would, by the laws of Canada, be a felony; * * * then the bringing such property into Canada * * * shall be an offence of the same nature, and punishable in like manner as if the stealing * * * had taken place in Canada, and such person may be tried and convicted in any district, county or place in Canada, into, or in which he brings such property, or has it in possession."

I am not aware of any English statute which contains a similar provision.

It is very like the law existing in the State of Michigan, referred to in the case of *People v. Williams*, 24 Mich. 156, 9 Am. R. 119, cited by Mr. Harrison.

Mr. Harrison, in his argument, seemed to be under the impression that the facts proven shewed a taking by a servant when he was indicted for embezzlement, and that the conviction for larceny was bad because the evidence in fact, only shewed an embezzlement.

The facts, however, stated in the case, as submitted to us, seem to have been, that certain moneys were received by the prisoner, an agent of the American Express Company at Winona, in the State of Illinois; the money having been handed to a clerk of the prisoner's in his presence, in the office of the express company, a receipt was given for it, and the clerk gave the package containing the money to the prisoner, who put it in the company's safe about 11 o'clock on 3rd July. The prisoner's duty was to make an entry in the receiving book of all moneys received in packages for transmission, but there was no entry of it in the book. On the same day the prisoner left Winona on a stock train at twenty minutes past 5 o'clock in the afternoon, and went through to Toronto, where he arrived on the morning of the 6th, and disposed of American currency to the extent of some \$5,000 or \$6,000.

The jury were requested to find whether he was guilty of

larceny or embezzlement, and they found him guilty of larceny, no objection being made to the charge of the learned Judge, further than that the evidence disclosed, if any offence, that of embezzlement and not larceny in the foreign country, and that the prisoner could not be convicted on that indictment, which charged him with bringing into Canada property stolen in such foreign country.

The learned Judge sentenced the prisoner to three years' imprisonment in the provincial penitentiary, but at the request of the prisoner's counsel reserved the question for the consideration of the Judges of this Court; and if the Court should be of opinion that the facts proved do not amount to larceny, and that the prisoner could not, under that indictment and the evidence, be legally convicted of bringing goods into Canada as stolen, the prisoner is to be discharged, otherwise the sentence is to be carried out.

The case of *Regina v. Wright*, 1 Dears. & B. 431, cited by Mr. McKenzie, shews that the facts proven on this trial amount to larceny. There the prisoner was a wine merchant, but he was also the local agent of a bank, and received £150 a year as a salary, and was to provide a place for carrying on the business. The office was attached to his own house, in which he carried on his business of a wine merchant.

The office was fitted up at the expense of the bank, and there was in it an iron safe, provided by and the property of the bank, into which it was the prisoner's duty to put any money received during the day, and which had not been required for the purposes of the bank. He sent in statements regularly to the bank, shewing money received, on hand, and paid out, and specified the notes, cash, or securities; and it was his duty to pay over weekly balances he did not want for his purposes. Audits were made from time to time, and the amount of cash on hand examined.

On the 29th September, 1855, his accounts were inspected, and found correct. From that time to 7th September, 1857, he made up his statements regularly, and

everything appeared correct, but no audit took place until the 12th September, 1857, when an appointment was made to examine his cash, when prisoner said he was about £3,000 short, and handed over all he had left, amounting to £755 10s. He made out an account, shewing a deficiency of £3,021 9s. 9d. When before the magistrate he admitted having taken this money.

The learned Judge advised the jury to find the prisoner guilty of larceny if they were satisfied that any part of the sum misappropriated had at any time within the two years been taken from the money sent by the branch bank to the prisoner, or from money which, having been received from customers, had before such taking been placed in the safe, and included in the weekly accounts furnished by the prisoner.

The jury found the prisoner guilty of larceny as a clerk, in having stolen some money received from customers, which, before such stealing, had been placed in the safe, and made the subject of a weekly account. They did not find the prisoner stole any of the money which had been sent to him from the branch bank.

Lord Campbell, in giving judgment, said, at p. 441: "When the money was placed in that safe, which was furnished by the employer, and of which the employer had a duplicate key, the exclusive possession of the prisoner was determined. The money being so deposited in the safe, and afterwards taken out of the safe by the prisoner *animo furandi*, he was guilty of larceny. The safe in this case very much resembles a till in a shop. The shopman has access to the till, and has a right to take money out of it for lawful purposes; but if he takes it out *animo furandi* he is a thief."

Coleridge, J., Martin, B., Crowder, B., and Watson, B., each gave judgments concurring in the same view.

It appears to us the principle of that case clearly applies to this. The prisoner was shewn, by the evidence, to have been the agent of the express company, who were the bailees of the money, and he put it into their safe, and

there was evidence to go to the jury to shew that after that he stole it out of the safe, and brought it to this city.

He therefore brought into Canada property stolen in another country, in such manner that the stealing would by the laws of Canada be a felony, and the statute declares that to be an offence of the same nature as if the stealing had taken place in Canada.

The first count of the indictment charges him with having stolen the property in a foreign country, and with subsequently bringing it into Canada, and the jury have found him guilty of this offence.

As we understand the objection which is urged by the prisoner, it is simply that the facts shew embezzlement, and not larceny. The case cited shews it is larceny, and that seems to us to be the end of it.

It is not urged, in terms at all events, that affirmative evidence must be given to shew that stealing by a clerk or agent from his employer of money which has come into the possession of the latter is, by the laws of the State of Illinois, larceny.

We do not feel inclined to suggest such a point for the benefit of any person who may be shewn to have done this *thing*, whatever we may call it.

We should say, if it were shewn that in the City of Chicago, while a man was riding in a street railway car, one of the passengers sitting beside him adroitly took his watch out of his pocket, and left the car, taking passage on the next train for Toronto, and on reaching this city sold the watch here, that he had brought stolen property into Canada, without shewing affirmatively there was any law in Illinois saying that such an act was larceny.

If a servant were to take his master's money out of a till in his shop in Chicago *animo furandi*, and brought it here, we should say that in bringing that money here he was bringing stolen money into Canada; and the same principle, we think, extends to the prisoner in this case.

In discussing the question of the examination of a witness in a foreign country, under a commission, as in *Lumley*

v. *Gye*, 3 E. & B. 114, Lord Campbell said, at p. 124: "The statute will reach a British subject committing perjury in a foreign country. We certainly do legislate so as to make some acts done in foreign countries penal here, as in the cases of murder and slave trading. But then our legislation applies only to British subjects."

Sir A. Cockburn, then Attorney-General, in argument said, "In all civilized countries there is some punishment for wilful false evidence."

In *Smith v. Collins*, 3 U.C.R. 1, where, in action of slander, the charge was, that plaintiff had stolen a cow in the United States, Sir J. B. Robinson said, at p. 3: "It is true, that we do not recognize the criminal law of foreign countries, and therefore it is argued that we cannot be certain that, by the laws of the United States, a man who has stolen a cow * * would be liable to any corporal punishment. The same might be said of words imputing murder, forgery, or arson. But surely we may infer, that in any civilized community which has laws and property to protect, to steal must be an offence of a very grave character. How they may punish it we may not precisely know. But I think the good sense of the rule, as now maintained, is, that the charging a man with committing abroad such a crime as would subject him to the punishment of felony here, by the common law fixes with equal certainty the character of the imputation, and places the man in fully as degraded a position in society."

Our parliament has not declared that larceny in the State of Illinois is a crime here, but that the bringing of the property stolen in another country into this country, when that property was stolen in such a manner as would have made it a felony here, is an offence of the same nature as if such stealing had taken place here.

We recognize the rights of the owners to their property when a trespasser brings it into this country. The fact that a thief brings it here does not deprive the owner of his property; and we will aid him to recover the property or its value. We see no good reason for saying

that when the thief brings the stolen property into this country, and disposes of it here, that our Legislature may not pass a law to punish him for so doing.

We do not think the people of the Dominion of Canada should be open to the reproach of being the receivers of stolen goods, or that this country should be an asylum for thieves ; and when they actually bring their plunder here, and vaunt it before our eyes, we cannot say that any rights, constitutional or moral, are violated in punishing them for it.

Conviction affirmed.



A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM EASTER TERM, 37 VICTORIA, TO MICHAELMAS TERM, 38 VICTORIA.

ACCEPTANCE.

See SALE OF GOODS, 3.

ACKNOWLEDGMENT.

Of title.]—*See* LIMITATIONS, STATUTE OF, 1.

ACTION.

Notice of.]—*See* POUND-KEEPER.

ADMINISTRATION BOND.

Assignment of—C. S. U. C., ch. 16, secs. 63, 65.]—An administration bond having been given to the Surrogate Judge of the United Counties of Huron and Bruce, and the union having been afterwards dissolved—*Held*, under C. S. U. C., ch. 16, secs. 63, 65, that the Judge of the senior county could not order such a bond to be assigned, not having been named by the Court of Chancery as the Judge to whose benefit it should enure; and that the plaintiff, suing as assignee under his order, must prove such nomination. *Stapf v. McCarrow*, 22.

ADMINISTRATION OF JUSTICE ACT, 1873.

Equitable defence under, mistake in deed.]—*See* EVIDENCE.

Pure money demand.]—*See* EXECUTORS AND ADMINISTRATORS.

See NEW TRIAL—STOCK, 2.

AMENDMENT.

Of conviction.]—*See* APPEAL, 2.

Of notice of title in ejectment.]—*See* LANDLORD AND TENANT, 3.

APPEAL.

1. *Conviction*—*Appeal to Sessions*—*Proof of recognizance*—*Waiver.*]—Defendant applied to quash an order of the General Sessions quashing a conviction, made on appeal, on the ground that it was not shewn at the Court that defendant had entered into the necessary recognizance. It was not denied that notice of appeal had been duly given or that the recognizance had been duly entered into and filed

with the Clerk of the Peace; but the objection was, that it had not been proved at the trial of the appeal. *Held*, under the circumstances of the case, set out in the report, that the respondent's counsel, by his conduct, must be assumed to have waived any objection to the recognition. *Regina v. Crouch*, 433.

2. *Conviction—Right of Appeal—Amending conviction.*]—The appellant was convicted before the police magistrate of a city for keeping a house of ill-fame, "contrary to a certain by-law of the corporation." She appealed to the sessions, in May following, where it was held that under 32-33 Vic., ch. 32, D., the decision of the magistrate was final. The appellant, on the 2nd of June, applied to this Court for a mandamus to the Sessions to hear the appeal, and the Police Magistrate on the same day filed with the Clerk of the Peace another conviction, stating the offence to be "contrary to the statute in such case made and provided," 32 Vic., ch. 32, under which there is no appeal.

Held, that the appeal should have been heard; and that after notice of appeal given and the time of hearing the appeal had arrived, no amendment could be made to the conviction. The mandamus was therefore ordered. *Regina v. Smith*, 518

ARBITRATION.

See RAILWAYS, 1, 2, 9.

ARREST OF JUDGMENT.

See COUNTY COURT.

ASSESSMENT ROLL.

Omission to complete in time.]—
See ASSESSMENT AND TAXES 1.

ASSESSMENT AND TAXES.

1. "*Assessment Act of 1869*"—*Bank stock owned out of the Province—Omission of assessor to complete roll in time—Effect of—Demurrer.*]—Under 32 Vic. ch. 36, O., bank stock is personal property liable to assessment.

Stock held by a resident of Kingston in the Merchant's Bank, which has its chief place of business in Montreal: *Held*, to be personal property owned out of the Province, and therefore exempt; for it was owned by such resident, so far as the Assessment Act was concerned, at the head or chief place of business of the bank.

Quære, whether the Sheriff could seize and sell such stock, merely because it might, if the directors chose, be made transferable at a branch office.

Where bank stock not assessable, because owned out of the Province, was assessed with other personal property from which it was stated as severable by the pleadings, and such assessment was confirmed by the Court of Revision and County Judge: *Held*, on demurrer, in replevin for goods distrained, that the defect of want of jurisdiction was not cured.

The omission of assessors in a city to make and complete the roll until after the 1st of May, does not avoid the assessment; and the person assessed having appealed to the Court of Revision and County Judge, paid part of his taxes, and refused to pay the rest on a ground inconsistent with this objection, would be precluded from taking it. —*Nickle v. Douglas*, 126.

[Since affirmed on appeal.]

2. *Toronto Street R. W. Co.—Assessment of.*]—*Held*, Morrison, J.,

dissenting, that under the Assessment Act, 32 Vic. ch. 36, O., the Toronto Street Railway Company was assessable for those portions of the streets occupied by them for the purposes of their railway, as being real estate within the meaning of section 3 of the Statute.—*Toronto Street Railway Company v. Fleming*, 264.

[Since reversed on appeal.]

3. *Voters' List*—32 Vic. ch. 21, O.—*Change of occupation before final revision.*—C. was in possession of property when the assessors went round to assess; but he left, and M. took possession before the assessment slip was delivered. Immediately on receiving it M. went and asked the assessor to change the assessment, as C. had gone to live elsewhere; but the assessor refused. M. then appealed to the Court of Revision, which refused to interfere, and afterwards to the County Judge, by whom the complaint was dismissed on a technical objection taken to the form of the complaint. On application for a mandamus to the Judge to enquire and determine whether M.'s name was not improperly omitted from the Electors' Roll: *Held*, that such objection should not prevail; and the mandamus was ordered. *Held*, also, that under the circumstances M.'s name should be entered on the list.—*Re McCulloch and the Judge of the County Court of the United Counties of Leeds and Grenville*, 449.

Covenant to pay taxes.]—See COVENANT, 1.

ASSETS.

Possession of by executor.]—See EXECUTORS AND ADMINISTRATORS.

ASSIGNEE.

Action against for goods not belonging to insolvent, in his hands.]—See INSOLVENCY, 1.

Reconveyance by to insolvent.]—See INSOLVENCY, 2.

ASSIGNMENT.

See ADMINISTRATION BOND.

BANKER.

See INSOLVENCY, 5.

BANK STOCK,

Owned out of the Province, assessment of; and sale of under execution.]—See ASSESSMENT AND TAXES, 1.

BILLS AND NOTES.

1. *Partial failure of consideration—Timber limits—Fraudulent representation—Equitable plea.*]—Declaration by payees against makers of a note for \$1000, payable at three months. Plea, on equitable grounds, that the plaintiffs falsely and fraudulently represented to the defendants that they had the right to cut hardwood timber under a crown license, on certain lands of which they gave defendants a list: that defendants, wishing to purchase such right, had all the lots examined, and thereupon relying upon and believing plaintiffs' said representations, and being induced thereby, as plaintiffs well knew, defendants agreed with the plaintiffs to purchase the right for \$2800 of which \$1800 was paid down, and this note given for the balance: that defendants relying, &c., cut and made timber on the lots; that the plaintiffs had no such right in

respect of a large quantity of said lands, by reason whereof defendants' rights acquired under said agreement were worth less by more than \$1000 than the plaintiffs represented they were possessed of and pretended to sell; that defendants first became aware of the fraud after they had paid the money and given the note and expended a large sum, and they are likely to lose the money expended by them in manufacturing a large quantity of the timber cut by them; and defendants prayed that it might be declared they were not liable to pay the note; and that the plaintiffs might be required to pay them a fair compensation for their loss by reason of such representations.

Held, on demurrer, plea bad; that it shewed only a partial failure of consideration, and not of any definite sum; that it was not a case of either legal or equitable set-off; and that the defendants could not prevent the plaintiffs' recovery until their right to damages or compensation, and the amount of it had been ascertained and, *semble*, that it should have shewn a tender of or readiness to pay the value of, or an offer to give up to plaintiffs the timber cut by them on the lots to which plaintiffs had no right; and perhaps, that since discovering the fraud they had cut no timber on such lots. — *The Georgian Bay Lumber Co. of Ontario v. Thompson et al*, 64.

2. *Stamps—Pleading—31 Vic. ch. 9—Action for penalty.*—Declaration, that defendant, on, &c., became the holder of and a party to a note made by one E., payable to one T., or bearer, &c., which note was made on unstamped paper, and was chargeable with duty under the 31 Vic. ch. 9, before the duty

chargeable by the statutes in that behalf had been paid, by affixing thereto the proper stamps in that behalf, and such note then and immediately after the time when defendant became the holder thereof not having thereon or affixed thereto the proper stamps, to the amount of the duty properly chargeable thereon, contrary to the said statute in that behalf; whereby, and by force of the statutes in such case, defendant forfeited \$100.

On motion to arrest judgment, *Held*, declaration good: and that it was unnecessary to negative the payment of double duty by defendant, for defendant's protection, if any, must arise, on the facts stated, under sec 12 of the 31 Vic., not sec. 11 by which the penalty is imposed, and it must therefore be pleaded.

The 36 Vic. ch. 13, repeals secs. 11 and 12 of 31 Vic. ch. 9, D., and substitutes others therefor: *Quære*, whether these sections should be pleaded as part of the first Act generally, or stating specially that they are so by virtue of the last Act: *Semble*, the latter.

It was objected that the reference here was to the 31 Vic. ch. 9, which was repealed when the alleged cause of action arose; but *Held*, sufficient.—*Edmunds qui tam v. Hoey*, 495.

Note given to a foreign Corporation—Action in Ontario.] — See FOREIGN CORPORATION.

BOND.

See ADMINISTRATION BOND.
RAILWAYS, 1.

BONUS.

See STOCK, 1.

BRIDGE.

Duty of Municipal Council to protect approaches to by railing.]—*Toms v. Corporation of the Township of Whitby*, 195.

Drawbridge—Negligence in Management of.]—See NEGLIGENCE, 2.

BROKER.

See INSOLVENCY, 5.

BY-LAWS.

Necessity for an annual by-law for issue of tavern licenses.]—See LIQUOR, SALE OF, 1.

To aid railway by bonus.]—See STOCK, 1.

See LIQUOR, SALE OF, 2.

CARRIER.

Carriage of goods by water—Mistake by master in delivery—Liability of owner—Vessel chartered for the trip.]—One H. had chartered a schooner from Goderich to Chicago, and not being able to fill her, told the plaintiffs' agent they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and this agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington, & Quincy R. R., Chicago. It had also P. & Co.'s brand on the barrels. There was about 2,400 barrels of salt on board besides, consigned to H. On the voyage, about 300 barrels of the deck load, not being a part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told

the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H. being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs got only 610 barrels.

Held, 1. That the owner of the vessel, and not H., was her owner for the trip, and the contractor with the plaintiffs.

2. That if the master delivered the salt on the dock as H.'s salt, when it was in fact the plaintiffs', the defendant would be answerable; that there was some evidence of his having done so; and that a verdict for the plaintiffs, therefore, should not be disturbed. *The Ontario Salt Co. v. Larkin*, 229.

[Since affirmed on appeal]

See RAILWAYS AND R. W. Co.'s, 4, 7, 8.

CERTIFICATE.

For Tavern Licenses.]—See LIQUOR, SALE OF, 1, 3.

CHARTER.

Of Vessel.]—See CARRIER.

COMMON COUNTS.

Action on common counts—Verdict—Issues divisible.]—In an action on the common counts, the pleas of *nunquam indebitatus* and payment are distributive, and a verdict may be entered on these issues for so

much of the amount sued for as the plaintiff fails to recover.

Such a verdict may not be proper in every case. In this case the substantial question at the trial was the plaintiffs' right to a sum of \$410, which the jury found for defendants, but the plaintiffs had a verdict for a sum of \$20, which defendants had never disputed, and had, as they asserted unintentionally omitted to pay. Under these circumstances the verdict was entered in defendants' favour for the residue. *Hope et al. v. Stewart et al.* 89.

CONSIDERATION, PARTIAL FAILURE OF.

Promissory note—Sale of timber limits—Fraudulent representation—Equitable plea.—Declaration by payees against makers of a note for \$1,000, payable at three months. Plea, on equitable grounds, that the plaintiffs falsely and fraudulently represented to the defendants that they had the right to cut hardwood timber under a crown license on certain lands, of which they gave defendants a list: that defendants, wishing to purchase such right, had all the lots examined, and thereupon, relying upon and believing plaintiffs' said representations, and being induced thereby, as plaintiffs well knew, defendants agreed with the plaintiffs to purchase the right for \$2,800, of which \$1,800 was paid down, and this note given for the balance: that defendants relying, &c., cut and made timber on the lots: that the plaintiffs had no such right in respect of a large quantity of said lands, by reason whereof defendants' rights acquired under said agreement were worth less by more than \$1,000 than the plaintiffs

represented they were possessed of and pretended to sell: that defendants first became aware of the fraud after they had paid the money and given the note, and expended a large sum, and they were likely to lose the money expended by them in manufacturing a large quantity of the timber cut by them. And defendants prayed that it might be declared they were not liable to pay the note; and that the defendants might be required to pay them a fair compensation for their loss by reason of such representations.

Held, on demurrer, plea bad: that it shewed only a partial failure of consideration, and not of any definite sum; that it was not a case of either legal or equitable set-off; and that the defendants could not prevent the plaintiffs' recovery until defendants' right to damages or compensation and the amount of it had been ascertained; and, *Seem*, that it should have shewn a tender of or readiness to pay the value of, or an offer to give up to plaintiffs, the timber cut by them on the lots to which the plaintiffs had no right; and, perhaps, that since discovering the fraud they had cut no timber on such lots. *The Georgian Bay Lumber Co. of Ontario v. Thompson et al.* 64.

See FRAUDS, STATUTE OF.

CONTRACT.

Agreement under seal—Parties—Building contract—Performance.—The agreement sued on was headed "Specification of a school-house in School Section No. 4, Tilbury East." Then followed in detail the size of the building, and the work and material to be employed, and it concluded: "The whole to be of good material, and to be finished in a good workmanlike manner, and

to be finished on the 1st July, 1873, In consideration the parties of the first part agrees to pay the party of the second part the sum of \$708, one-half on the 15th May, and the other half when the said school-house is completed." Then followed the signatures of the three School Trustees, with their corporate seal, and the signature of the plaintiff. It bore no date, but was proved to have been executed by the parties about the 1st March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him \$400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly constructed, but the learned Queen's Counsel, who tried the case without a jury, found for the plaintiff for the balance of the \$708.

Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld.—*Coghlan v. The School Trustees, School Section No. 4, of the Township of Tilbury East, in the County of Kent*, 575.

Limiting Railway Co.'s liability for accident.—See RAILWAYS AND R. W. Co. 4.

By Railway Co. to carry beyond its own line.—See RAILWAYS AND R. W. Co., 8.

See CARRIER—FRAUDS, STATUTE OF—SALE OF GOODS—SALE OF LAND.

CONTRACTOR.

For building R. W.—Liability of for injury by fire.—See RAILWAYS & R. W. Cos., 4.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCE.

Preparation and tender of on sale of stock—Estate under.—See ESTATE—STOCK, 2.

Covenants for title in—See COVENANT, 2.

Estate under.—See ESTATE.

CONVICTION.

See APPEAL, 1, 2—LIQUOR, SALE OF

COSTS.

Demurrer—Exceptions to pleas.—On demurrer to the pleas the defendant raised exceptions to the declaration, of which he had given no notice. The Court, finding such exceptions entitled to prevail, and thinking the pleas bad, gave judgment accordingly, without costs to either party. *Stapf v. McCarrow et al.* 22.

CORPORATIONS.

See FOREIGN CORPORATION.
SALE OF GOODS, 3.

COUNTY COUNCIL.

Power of to alter High School limits.—*Re Tyrrell and the Corporation of the County of York*, 247.

Assumption of roads by.—See HIGHWAYS, 1, 4.

COUNTY COURT.

Arrest of judgment in County Court cases tried at Assizes.—*Held*, under the Law Reform Act, 1868, sec. 17, subsecs. 4 and 5, as amended by the 33 Vic., ch. 71, O., this being a County Court case tried at the

Assizes, that the motion to arrest judgment was properly made in this Court.—*Edmunds qui tam v. Hoey*, 495.

COVENANT.

1. *Lease—Covenant to pay taxes—Construction of.*—Defendant in 1872, (the day and month not being given) leased a farm from the plaintiff for a year from the 27th of September, 1872, and covenanted by the lease to pay during the said term “all taxes, rates * * assessments * * whatsoever, whether parliamentary, municipal, or otherwise, which now are or which during the continuance of the said term, * * shall at any time be rated, charged, assessed, or imposed in respect of the said premises;” with a proviso for re-entry for breach of covenants.

Held, Wilson, J., *dissentiente*, that defendant was not liable for the taxes for 1872, which had been assessed against the plaintiff; for that the words “all rates, &c., which now are,” referred to the kind or character of the tax assessable against the land, and the words “or which shall at any time, &c.” to any other kind of taxes which might thereafter be imposed.

Per *Wilson, J.*, defendant was liable, the sum being a tax at the making of the lease charged in respect of the land. *Quære*, whether he would have been liable for any taxes for previous years unpaid.—*McNaughton v. Wigg*, 111.

2. *For title.*—A covenant in a deed, purporting to be made in pursuance of the Act respecting short forms of conveyances, that the grantor “hath the right to convey the said land to the said party of the second part,” omitting the

words “notwithstanding any act of the covenantor,” contained in column 1 of schedule 2 of the Act. *Held*, not a covenant within the Statute; but to mean that the covenantor had the right to convey as he had conveyed, *i.e.*, in fee simple. *Held*, also, that the omission of these words did not affect the succeeding covenants for quiet possession and further assurance, and that defendant had done no act to encumber by making them absolute covenants; these covenants being in accordance with the form in column 1.

The evidence shewed that when the grantor conveyed there was a mortgage on the land by a prior owner, unpaid; but the grantee, the plaintiff, had taken possession and left after a month, not having been evicted, and no one else had been in possession since; and it did not appear that he had been unable to sell, nor that the defendant, the covenantor, had been guilty of any fraud. *Semble*, that only nominal damages could be recovered, the covenant being in effect the same as a covenant for seisin, and a continuing one. *Held*, also, that the equitable defence, set out in the report, was not made out, there not being enough shewn to obtain an unconditional injunction.—*Brown v. O'Dwyer*, 354.

See CONTRACT.

CRIMINAL LAW.

Larceny in the United States—Conviction here—32-33 Vic., ch. 21, 112 D.]—The prisoner being the agent of the American Express Co. in the State of Illinois, received a sum of money which had been collected by them for a customer, and put it in their safe, but made no entry in their books of its receipt,

as it was his duty to do, and afterwards absconded with it to this Province, where he was arrested. *Held*, that he was guilty of larceny, and was properly convicted here under 32-33 Vic. ch. 21, sec. 112, D.—*Regina v. Hennessy*, 603.

See APPEAL, 1, 2.—HIGHWAYS, 2.

DAMAGES.

1. *Double Distress.*]—Remarks as to the hardship of the Statute allowing double damages for distraining when no rent due, when the landlord has acted upon an erroneous construction of a doubtful lease.—*Brown v. Blackwell*, 239.

2. *Injury to plaintiff's boat by collision—Action for—Measure of damages.*]—In an action for injury to plaintiff's vessel caused by collision with defendant's steamboat: *Held*, that the plaintiff was entitled to recover the costs of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, or for the profits which he would have earned by her employment.

Semble, that in an action of trover for a vessel, the loss of profits may be recovered.—*Brown v. Beatty et al.* 328.

Excessive Damages.]—See HIGHWAYS, 3.

Remote and proximate causes of damages.]—See HIGHWAYS, 3.

See INSOLVENCY, 4.—RAILWAYS, 7.—SALE OF LAND.

DEED.

Construction as to parties to.]—See CONTRACT.

By Conveyance under Short Forms Act.]—See COVENANT, 2.

See DESCRIPTION OF LAND—ESTATE—REGISTRATION.

DELIVERY.

Of Goods—Mistake in.]—See CARRIER.

DEMURRER.

Exception to pleas, want of notice of—On demurrer to the pleas, the defendant raised exceptions to the declaration, of which he had given no notice. The court, finding such exceptions entitled to prevail, and thinking the pleas bad, gave judgment accordingly, without costs to either party. *Stapf v. McCarrow et al.*, 22.

See STOCK, 2.

DESCRIPTION OF LAND.

1. *Patent.*]—*Held*, under the facts and evidence set out in the report, that the plaintiff, claiming under a patent for part of lot 29 in concession A “according to a plan of survey by Provincial land surveyor J. L. P. O’Hanly, dated on the 9th January, 1860, of record in the Crown Lands Department,” was confined to and governed by the plan mentioned, and could not claim according to the legal limits of the lot by the original survey.—*O’Donnell v. Tiernan*, 181.

2. *Deed—Latent ambiguity—Parol evidence.*]—Defendant, owning a block of land which had been laid out in village lots, conveyed it to S., the plaintiffs’ grantor, reserving thereout several village lots, and among them lots 1, 3, and 3, on the south side of Queen Street, in tier 2. There was in fact no such lot 1 laid out, either on the plan of the village or on the ground, the first lot on the south side of Queen Street

being No. 2. S., in 1870, conveyed to the plaintiffs part of village lot 4, on the south side of Queen Street, in tier 2. The adjoining lot, 5, was then pointed out to the plaintiffs as being 4, and they built upon it, defendant occupying 2, 3, and 4, and having a blacksmith's shop on 4, which lot he had occupied ever since his sale to S., as one of the reserved lots. The plaintiffs having brought ejectment for lot 4: *Held*, —Richards, C. J., doubting,—that, as the extrinsic evidence, shewing that there was no lot 1, disclosed a mistake in the description of the lots reserved and a latent ambiguity, parol evidence might be received to explain it; and that the reservation might be construed as meaning lots 2, 3, and 4, or the first, second, and third lots on that side of the street.—*Kean et al v. Drope*, 415.

DESISTMENT.

Notice of.]—See RAILWAYS AND R. W. Cos., 29.

DISCHARGE OF MORTGAGE.

See MORTGAGE.

DISTRESS.

Where no rent due—Double Damages.]—See DAMAGES.

DIVISION COURT.

Executions in.]—See INSOLVENCY, 3, 4.

DRAW-BRIDGE.

Management of.]—See NEGLIGENCE, 2.

DRUGGIST.

See LIQUOR, SALE OF, 4.

EJECTMENT.

See LANDLORD AND TENANT, 3

ELECTIONS.

See ASSESSMENT AND TAXES, 3.

EQUITABLE DEFENCE.

In Ejectment.]—See LANDLORD AND TENANT, 2.

In action on note.]—See BILLS AND NOTES, 1.

See EVIDENCE.

ESTATE.

Rule in Shelley's case.]—Under a conveyance of land to M., to hold "during her natural life, then to go to her heirs equally alike, and their heirs and assigns forever." *Held*, that the rule in Shelley's case applied, and M. took a fee.—*Brown v. O'Dwyer*, 354.

EVIDENCE.

Rejection of.]—In an action in which the rent was held to be payable in advance, evidence was tendered that the instructions to draw the lease, and the agreement of both parties, was that the rent should be paid in advance.

Held, there being no equitable plea, that such evidence was properly rejected; and that an equitable defence is not admissible under the general issue by Statute.

Held, also, that under the Administration of Justice Act, 1873, defendant could have pleaded an equitable plea setting out the facts relied on for altering the lease, in accordance with the agreement of the parties; and a verdict for

plaintiff was set aside on payment of costs, to enable him to do so. *Brown v. Blackwell*, 239.

Admission of parol evidence to explain deed.] — See DESCRIPTION OF LAND, 2.

Of admissions.] — See SALE OF GOODS.

Of payment of rent, as acknowledgment of title by party in possession of land.] — See LIMITATIONS, STATUTE OF.

See HUSBAND AND WIFE.

EXCESSIVE DAMAGES.

See HIGHWAYS, 3.

EXECUTIONS.

See INSOLVENCY, 3, 4.

EXECUTORS AND ADMINISTRATORS.

Promise to pay legacy—Possession of assets—Pleading—Administration of Justice Act, 1873.] — The declaration alleged that one S., by his will, appointed defendant his executor; and after devising his farm, directed his remaining real estate to be sold and the proceeds thereof and his money and notes to be equally divided between his three sons, of whom plaintiff and defendant were two; that defendant proved the will and became possessed of assets more than sufficient to pay plaintiff's claim under the will, and properly applicable to the payment thereof, and afterwards promised and agreed with the plaintiff that the plaintiff was entitled to receive from him \$500, and stated that sum as the plaintiff's claim under the will; and thereupon, in consideration of the premises, defendant promised the

plaintiff to pay, and the plaintiff agreed to accept, the said sum of \$500 as and for his claim. Defendant pleaded that he did not become possessed of assets, and that he did not promise; and the jury found in his favour on the first plea.

Held, 1, that the plaintiff's claim was not "a purely money demand," to which his right was an equitable one only, under sec. 2 of the Administration of Justice Act, 1873; and if it were, that that section, which did not take effect till 1st January, 1874, would not apply to this action begun on the 11th December, 1873.

2. That the allegation of defendant having assets was material, and the verdict on the first plea was therefore a bar to plaintiff's recovery.

3. That the possession of such assets was put in issue by the denial of the promise as alleged,—*i. e.*, of the promise having been made in consideration of the premises.

Semble, under the facts stated in the case, that the count should have averred a tender of a release or a readiness and a willingness to execute it.—*Soules v. Soules*, 334.

FAILURE OF CONSIDERATION.

Partial.] — See CONSIDERATION, PARTIAL FAILURE OF.

FENCE.

Obligation of railway to build.] — See RAILWAYS AND R. W. Cos. 10.

FIRE.

Negligence in leaving brushwood near line of railway.] — See NEGLIGENCE, 1.

Negligence in setting out.—See RAILWAYS AND R. W. COS., 5.

From locomotives.—See RAILWAYS AND R. W. COS. 3.

FOREIGN CORPORATIONS.

Promissory note.—A foreign corporation may sue in this country on a promissory note given to them here for goods furnished by them to the maker.

Review of authorities as to the right of a foreign corporation to contract and carry on business here. *Semble*, that they may also, under certain circumstances, maintain an action for the breach of an executory contract entered into here in the ordinary course of their business.—*Howe Machine Co. v. Walker*, 37.

FRAUDS (STATUTE OF).

Promise to pay the debt of another—Consideration]—A. being indebted to the plaintiff in \$1,100 for timber furnished to him, and used in a vessel which he had contracted to build for the defendant, the plaintiff refused to furnish any more, and the defendant then said to him that if he, the plaintiff, would furnish what further timber was required to finish the vessel, he, defendant, would pay the plaintiff for it, on the plaintiff getting an order from A.; and that if the plaintiff got an order from A. for the debt then owing by the plaintiff to A., he would pay it. *Held*, that the promise as to the \$1,100 was void, under the Statute of Frauds, not being in writing; and that it must be regarded as a mere naked undertaking to pay A.'s debt, not as made in consideration of the plaintiff furnishing A. with the timber.—*Rounds v. May*, 367.

FRAUDULENT REPRESENTATION.

See BILLS AND NOTES, 1.

GRAVEL PIT.

Purchase of by R. W. Co.—*Semble*, that a purchase of land by defendants for a gravel pit under 18 Vic. ch. 176, sec. 20. is to be governed by the same proceedings as purchases of other lands by the company. See judgment in note a, p. 159.—*Mitchell v. Great Western R. W. Co.*, 148.

GUARANTEE.

See FRAUDS, STATUTE OF.—RAILWAYS AND R. W. COS., 1.

HEARSE.

See SALE OF GOODS, 2.

*HIGH SCHOOLS.

High school districts—Power to change the limits of—34 Vic. ch. 33, sec. 40, O].—Under the 34 Vic. ch. 33, O., the County Council has impliedly the power, from time to time, to change the limits of the High School District, and not merely to do so once, or when an additional school is established.—*Re Tyrell and The Corporation of the County of York*, 247.

HIGHWAYS.

1. *Road dividing townships—Jurisdiction over—Assumption of by county—Duty to repair—Municipal Act of 1873, sec. 410, et seq.*—Sec. 410 of the Municipal Act of 1873 must be read as modified by secs. 416 and 431, and as meaning that every road dividing different townships shall when assumed by the

County Council, be within the exclusive jurisdiction of the county.

The only acts in this case done by the county with respect to the road in question, which was a road dividing different townships, was to make five yearly grants for the entire line, which was expended by commissioners appointed for the purpose: *Held*, no evidence of an assumption of the road, but the contrary, that being the course directed when the county is doing the work because the townships are not willing to do it themselves.

Quære, whether a county can so assume a road as to take the burden of repairing it off another municipality, except by by-law.

Remarks as to the duty of repairing highways, with reference to the age and population of the settlement, the means of the township, the nature of the ground, and all the surrounding circumstances; and as to the proper direction to a jury. The only rule that can be given is, that the public are entitled to have such a road as under all the circumstances they may fairly and reasonably demand, and the municipality be called upon to provide.

In this case, in an action for non-repair, a verdict for the plaintiff was upheld, upon the facts stated in the report.—*O'Connor v. The Township of Otonabee and the Township of Douro*, 73.

2. *Indictment for obstructing.*]—The defendant, having built a row of shops coming up to the highway, erected a platform in front of them upon the highway, and raised about three feet above it, with a flight of steps leading down from one end and into the side road which intersected it. The road on which the shops were had been a public highway for forty years, until about

fifteen years ago, when it was gruelled by a joint stock road company, who had since kept it in repair and collected tolls. The defendant was convicted on an indictment for thus obstructing the highway, the jury having found that the platform was in fact a nuisance.

Held, that the conviction was right, and that the road being a highway, its assumption by the road company was no answer to the indictment.—*Regina v. Davis*, 107.

3. *Approaches to bridge—Duty to protect by railing — Remote and proximate cause of accident—Excessive damages.*]—The plaintiff and his wife sued defendants for injury alleged to have been caused to the wife by their neglect to have a railing or guard along an embankment leading down to a bridge on one of their leading highways in a populous township. It appeared that the wife and her son, about eight years old, were crossing the bridge in a buggy, when the horse shied at some new planks on the bridge, and backed to the end of it, where the hind wheels went over the bank, throwing her out and into the water, about fourteen feet below. The jury found, upon the evidence set out in the case, that the road was not in a sufficiently safe state, and that the wife was guilty of no negligence in the management of the horse.

Held, Morrison, J., doubting, that it was the duty of defendants to fence or guard the place in question: that the injury was caused by the want of such protection as the proximate cause, not by the horse becoming frightened and unmanageable; and that defendants therefore were liable.

The authorities, as to remote and

proximate causes of damage, reviewed.

The damages, \$2,500, being in the opinion of the Court excessive, a new trial was granted on that ground, on payment of costs, unless the plaintiffs would consent to reduce the verdict to \$1250. *Toms et ux. v. Corporation of Township of Whitby*, 195.

4. *County corporations—Right to acquire township roads—Municipal Act of 1866, sec. 341—C. S. U. C. ch. 49, s. 69.*—The corporation of a township having constructed a gravel road, on which they were levying tolls, arranged with the corporation of the county for the assumption by the county of this and other roads as county roads, and removing the tolls therefrom; and by deed conveyed the road to the county, on condition that it should revert to the township again in the event of tolls being imposed. The county gave debentures to the township for the purchase money, took possession of the road, and made repairs thereon.

Held, in appeal, that the county could not acquire the road under sec. 341 of the Municipal Act of 1866, it being already a gravel road, and that they had no power otherwise to purchase it, though the township by C. S. U. C. ch. 49, sec. 69, were authorized to sell.

Held, also, that the road therefore not being vested in the county, they were not liable for neglect to keep it in repair.—*Hacking v. The Corporation of the County of Perth*, 460.

5 *Road allowance—Deviation from—By-law to open.*—An original allowance being impassable at one point, owing to ravines, &c., the road commissioners, about seventy

years ago laid out the road a little to the north, where it had since been used as the highway. It did not appear that the owners of the lots over which it passed got any compensation for their land thus taken, and they had had possession ever since the original road allowance which it was alleged had been given to them in lieu of such land. Under these circumstances, the Court, following *Burritt and the Corporation of Marlborough*, 29 U. C. R. 119, quashed a by-law to open the original allowance.—*In Re Webster and The Corporation of West Flamborough*, 590.

Liability of railway for accident at a crossing.—See RAILWAYS AND R. W. Cos., 6.

HUSBAND AND WIFE.

“Tools,” meaning of—*Contract—Party to sue—Evidence of admissions*—Where in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant for the sale by the latter to the former, but the land on which the works and machinery were was conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration.

Held, that the plaintiff, and not his wife, was the proper person to sue.

Held also, that the acts or admissions of the plaintiff were clearly admissible in evidence.—*Filschle v. Hogg*, 94.

See STOCK, 2.

INDICTMENT.

See CRIMINAL LAW—HIGHWAYS, 2.

INSOLVENCY.

1. *Insolvent Act of 1869, sec. 50—Replevin.*]—Where the goods of A., having been seized by the sheriff under an execution against B., had been handed over by the sheriff to an assignee, to whom B. had made a voluntary assignment in insolvency.

Held, that A. might maintain replevin against the assignee.

Held, also, that sec. 50 of the Insolvent Act of 1869 could not apply against the plaintiff, who was not a creditor or in any way interested in the estate of the insolvent.—*Burke v. McWhirter*, 1.

2. *Insolvent Act of 1869—Composition—Reconveyance to insolvent.*]—Declaration on the common counts. Plea, that the plaintiff before action made an assignment under the Insolvent Act of 1869, to an official assignee, in whom the causes of action became vested. Replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed by the requisite number in value of the creditors, duly reconveyed to the plaintiff all the estate, &c., theretofore belonging to the plaintiff and then vested in the assignee. Rejoinder, that after the deposit of the deed of composition and discharge with the assignee by the plaintiff, the assignee did not immediately give notice of such deposit by advertisement, as required by the Act.

Held, on demurrer, rejoinder good, for by the Statute the giving of such notice is a condition precedent to the reconveyance by the assignee, which, without it, does not bind non-assenting creditors.

Held, also, replication good, for under the averment that the assignee *duly* reconveyed, the plaintiff

would be bound to prove such notice, in the absence of a confirmation by the judge. *Nicholson v. Gunn*, 7.

3. *Insolvent Act of 1869, sec. 59—Operation of executions.*]—Section 59 of the Insolvent Act of 1869 applies to judgment debts recovered in Division Courts on which execution has been issued to and the money levied thereunder by a bailiff of such courts, although the section speaks only of executions delivered to the sheriff.

It was objected that the defendant received the money only as clerk of the Court, but it appeared that the sale had taken place after the assignment; but *Held*, that there being no lien created by the mere seizure, which took place before the assignment, the plaintiff, as assignee, was entitled to the money as part of the insolvent's estate, no matter in whose hands it might be.—*Patterson v. McCarthy*, 14.

4. *Insolvent Act—Operation of assignment—Division Court bailiff—Action for delay in selling under execution.*]—Defendant, a Division Court bailiff, received an execution against K. on the 12th of May, 1873, on a judgment recovered on that day, on which, on the 14th, he seized two horses. On the 10th K. executed a voluntary assignment under the Insolvent Act, but the assignee on being made acquainted with it advised a private settlement, and did not receive and act on the assignment until the 7th June. The bailiff, who had left the horses in K.'s possession taking a bond for their forthcoming, took them again and advertised them for sale on the 2nd of June, but on being notified by the official assignee he delivered them over

to him on the 9th. The plaintiff then sued the bailiff and his sureties on their covenant for not selling and paying over the money between the seizure and the claim by the assignee. *Held*, that he could not recover; for 1. there was no misconduct, because the horses passed to the assignee on the execution of the assignment, which was before the judgment; and 2. if the delivery was a breach of duty the plaintiff had sustained no damage from it, for if the bailiff had proceeded to sell sooner the assignee would no doubt have claimed the horses, as he did afterwards.—*Brown v. Wright et al.* 378.

5. *Insolvent Act, 1869—Trader.*] —A banker, and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks: *Held*, a trader within the Insolvent Act of 1869.—*Duncan v. Smart*, 532.

INTEREST.

See SALE OF LAND.

ISSUES.

In action on common counts divisible.]—*Hope et al v. Stewart et al.*, 89.

LAND.

Compensation for land taken by railway.]—See RAILWAYS AND R. W. Cos., I.

See DESCRIPTION OF LAND.

LANDLORD AND TENANT.

1. *Ejectment—Yearly tenancy—Notice to quit—Disclaimer.*] —In ejectment the plaintiff and defendant both claimed by their notices under one P. It appeared at the

trial that P. sold to the plaintiff in 1868, and that defendant had been living on the premises since 1864, having paid to P.'s agent about two years' rent in money and repairs. Defendant was not asked at the trial to admit the plaintiff's title. *Held*, that a yearly tenancy must clearly be assumed, and that as no notice to quit was shewn, the plaintiff could not recover.—*Birchall v. Reid*, 19.

2. *Action for distraining when no rent due—Lease, construction of—Equitable defence—Not guilty by Statute—Reformation of lease—Administration of Justice Act, 1873.*] —Defendant on the 2nd of September, 1872, leased land to the plaintiff for five years from the 1st of October, 1872, at the yearly rent of \$230, payable "on the first day of October of each year, in each and every year," during the continuance of the term, "the first payment of \$200 to be made on the 31st of December, 1872, in advance the balance of said year's rent, amounting to \$30, to be paid at the same time that the payment for 1873 is to be made." In an action against the defendant for distraining on the 9th of October, 1873, for the second year's rent, defendant pleaded the general issue by Statute. *Held* that such rent was not payable in advance.

Evidence was tendered that the instructions to draw the lease, and the agreement of both parties, was that the rent should be paid in advance. *Held*, there being no equitable plea, that such evidence was properly rejected; and that an equitable defence is not admissible under the general issue by Statute. *Held*, also, that under the Administration of Justice Act, 1873, defendant could have pleaded an equi-

table plea setting out the facts relied on for altering the lease, in accordance with the agreement of the parties; and a verdict for the plaintiff was set aside on payment of costs, to enable him to do so.

Remarks as to the hardship of the Statute allowing double damages for distraining when no rent due, when the landlord has acted upon an erroneous construction of a doubtful lease.—*Brown v. Blackwell*, 239.

3. *Lease—Yearly tenancy—Notice to quit—Waiver by acceptance of rent.*]—C., on 1st of May, 1866, leased to defendant for ten years at a yearly rent, payable quarterly on the 1st of January, April, July, and October, with a proviso that if the lessor should sell during the term the lessee would give up possession on six months' notice. On the 11th of November, 1872, a notice to quit at the end of six months was given to defendant, signed by C. and by S., to whom C. had sold the premises, and to whom C. conveyed on the 7th of May, 1873. Defendant paid rent to C. and S. to 1st January, 1873. S. conveyed to the plaintiff on the 12th of July, 1873, and, on the 28th of October following, defendant, who had continued in possession, paid to the plaintiff the quarter's rent due on the 1st of October. *Held*, that defendant was in under a yearly tenancy created by plaintiff's acceptance of rent, and could not be ejected by plaintiff without notice. *Quære*, whether he could not claim under the original lease, on the ground that the notice to quit by C. and S. had been waived by the acceptance of rent by S. By his notice he claimed under the original lease; but *Held*, that, if necessary, this should be

amended.—*Manning v. Dever et al.*, 294.

Liability of lessor or lessee of drawbridge.]—See NEGLIGENCE, 2.

See LEASE.

LARCENY.

In foreign country.]—See CRIMINAL LAW.

LATENT AMBIGUITY.

See DESCRIPTION OF LAND.

LEASE.

1. *Covenant to pay taxes—Construction of.*]—Defendant in 1872, (the day and month not being given) leased a farm from the plaintiff for a year from the 27th of September, 1872, and covenanted by the lease to pay during the said term all "taxes, rates, assessments, * * whatsoever, whether parliamentary, municipal, or otherwise, which now are or which, during the continuance of the said term, * * shall at any time be rated, charged, assessed, or imposed in respect of the said premises," with a proviso for re-entry for breach of covenants, *Held*, Wilson, J., dissentiente, that defendant was not liable for the taxes for 1872, which had been assessed against the plaintiff, for that the words "all rates, &c., which now are," referred to the kind or character of the tax assessable against the land, and the words "or which shall at any time," &c., to any other kind of taxes which might thereafter be imposed.

Per *Wilson, J.*, defendant was liable, the sum being a tax at the making of the lease charged in respect of the land. *Quære*, whether

he would have been liable for any taxes for previous years unpaid.—*McNaughton v. Wigg*, 111.

2. *Construction of.*]—Defendant, on the 2nd of September, 1872, leased land to plaintiff for five years from the 1st of October, 1872, at the yearly rent of \$230, payable “on the 1st day of October of each year, in each and every year,” during the continuance of the term, the first payment of \$200 to be made on the 31st of December, 1872, in advance, the balance of said year’s rent, amounting to \$30, to be paid at the same time that the payment for 1873 is to be made. In an action against the defendant for distraining, on the 9th of October, 1873, for the second year’s rent, defendant pleaded the general issue by Statute. *Held*, that such rent was not payable in advance.—*Brown v. Blackwell*, 239.

See COVENANT, 1—LANDLORD AND TENANT, 1.

LEGACY.

See EXECUTORS AND ADMINISTRATORS—RAILWAYS AND R. W. COS., 10.

LICENSE.

See LIQUOR, SALE OF—POSSESSION.

LIMITATIONS, STATUTE OF.

Ejectment—Payment of rent—Acknowledgment of title.]—The plaintiffs claimed title through A. R., one of the children and devisees of J. C. The defendant claimed through A. R. and the other devisees of J. C., and by length of possession, J. C. died in 1843, having, by his will made in 1841, devised this land to his children in fee.

A. R. died in 1851. Neither

she nor any one on her behalf had any possession since 1848.

It was proved that in 1848 one F., who was then on the lot, and through whom defendant claimed, told one M. that he had A. R.’s share of the lot, and was to pay the rent to C., the solicitor for the plaintiffs in a Chancery suit brought by F., and by A. R. and other plaintiffs, for partition of J. C.’s property, on account of the costs of that suit; and that he afterwards told the eldest son of A. R., in 1850, who went to him for rent, that he kept it back to pay the costs. It also appeared that F. had paid money about 1857 to the town agent of C. in that suit on account of the costs. It was sworn, however, that F. occupied under a brother of A. R., whose right he had purchased, not under A. R., and no lease was proved from A. R., nor any authority from her for the payment to C.

Held, Wilson, J., dissenting, not sufficient evidence of payment of rent to A. R. to take the case out of the statute.

The defendant, in a bond to F., dated in 1856, recited that he, defendant, had bought in the estate of all the owners of this lot, except the estate of the family of F., and of such other of the claimants as were under disability, which class would include the plaintiffs—which defendant was to get in; and an agreement in writing was made between F. and another and the defendant, in 1855, by which defendant agreed to buy in all the interest of the children of the late J. C. in this lot.

Held, not an acknowledgment under the statute, not being given to the plaintiffs or their agent.

The construction of J. C.’s will as declared in *Read v. Smith*, 16

Grant 55, concurred in and followed.—*Ruttan et al. v. Smith*, 165.

LIQUOR, SALE OF.

1. *Certificate for tavern licenses—Power to limit.*—*Held*, Wilson, J., dissenting, that before 37 Vic. ch. 32, O., a township municipality was not authorized to pass a by-law that in each and every year thereafter there should not be more than four *certificates* for obtaining tavern licenses issued in the municipality; for that there was no power to limit the number of such certificates, and there was a substantial difference between that and limiting the number of licenses.

Quere, as to the necessity for an annual by-law before 37 Vic. ch. 32, O. *In Re Gifford and the Corporation of the Township of Darlington*, 285.

2. *Regulation of taverns—Prohibiting light in bar-room*—32 Vic. ch. 32, sec. 6, O., *construction of.*—The 32 Vic. ch. 32, sec. 6, O., enables the Police Commissioners to pass by-laws for “regulating” licensed taverns. A by-law under this provided that the bar-room should be closed and unoccupied, except by members of the keeper’s family or his employees, *and should have no light therein except the natural light of day*, during the time prohibited by the by-law for the sale of liquors, *i. e.*, from 12 at night to 5 a.m.

Held, that the by-law was unauthorized, and a conviction under it was quashed. *Regina v. Belmont*, 298.

3. *License to sell liquors—Issue of before inspector’s certificate*—32 Vic. ch. 32, O.]—The 32 Vic. ch. 32, as amended by 33 Vic. ch. 28,

O., (now repealed by 37 Vic. ch. 32, O.,) enacted that no certificate for a license should be granted to any applicant until the inspector should have reported that the proper accommodation, &c., and any member of a municipal corporation who should, contrary to the Act, cause a certificate to be issued, was subject, on conviction thereof, to be fined. B. applied for a license, at a meeting of the Council, on the 28th February, but the inspector reported that his premises were insufficient, the defect being the want of a step in the stairs. A minute was entered that the license should be granted as soon as he produced the inspector’s certificate, and defendant, the reeve, signed a certificate and gave it to the clerk, instructing him not to hand it over until he had received the inspector’s certificate; this was received on the 2nd of March, and the certificate then given to B.

Held, that there had been no breach of the statute, and a conviction of defendant was quashed. *Regina v. Paton*, 442.

4. *Sale of liquor without license—Druggist — Conviction.*—A conviction of defendant, who was a registered druggist, made before the 37 Vic. ch. 32, O., for selling spirituous and intoxicating liquors by retail, to wit, one bottle of brandy to one O. S. at and for the price of \$1.25, without having a license so to do as by law required; the said spirituous and intoxicating liquors being so sold for other than strictly medical purposes only.

Held, valid, for he was not, as a druggist, authorized to sell without license, and it was unnecessary to shew that he was not licensed, or to negative any exemptions or exceptions.

Semble, that selling a bottle of brandy is selling by retail.—*Regina v. Denham*, 503.

MANDAMUS.

See APPEAL, 2—ASSESSMENT AND TAXES, 3—STOCK, 1.

MASTER AND SERVANT.

See RAILWAYS & R. W. COS., 4.

MEASURE OF DAMAGES.

See DAMAGES.—SALE OF LAND.

MEMORANDA.

194, 432.

MIDLAND RAILWAY OF CANADA.

10 Vic. ch. 109—*Registry fees on deeds*.]—By the 10 Vic. ch. 109, the Registrar was entitled to receive only the sum of 2s. 6d. from defendants for registering deeds made to them in the form given by the Act. In 1865 the Registry law was changed, and deeds were required to be registered in full, instead of by memorial, as before. In 1873 and 1874 defendants brought for registry deeds made to them, which contained covenants for title not in the statutory form: *Held*, that for such deeds the Registrar was entitled to charge his full fees, and was not restricted to the 2s. 6d.—*Ward v. The Midland Railway of Canada*, 120.

MISTAKE.

In deed—Reformation of.]—See EVIDENCE.

See CARRIER.

MORTGAGE.

Certificate of discharge—Form of.]—A mortgagor before his death paid about three-fourths of the mortgage money, and his widow, acting for his estate, paid the rest. The certificate of discharge, given four years after his death, under 29 Vic. ch. 24, O., and duly registered, stated that the mortgagor had satisfied the mortgage, and that it was therefore discharged: *Held*, sufficient. *Semble*, that it would have been sufficient, also, if the payer's name had been altogether omitted.—*Carrick et al. v. Smith*, 348.

MUNICIPAL CORPORATIONS.

Contract with not under seal.]—See SALE OF GOODS, 3.

See HIGH SCHOOLS—LIQUOR, SALE OF—STOCK—HIGHWAYS, 1, 3, 4—RAILWAYS AND R. W. COS., 6.

NEGLIGENCE.

1. *R. W. Co.—Fire from locomotive—Negligence in leaving brushwood on their lands—Brushwood fence—Contributory negligence—14 Geo. III. ch. 78*.]—In an action against a railway company for negligently allowing their land adjoining the track to remain covered with brushwood, &c., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's land, it was shewn that the railway fence, in which the fire originated, was a brush fence, the line having been recently built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under the

C. S. C. ch, 66, sec. 4, and he had felled them lengthwise with the track and left them there.

The jury having found for the plaintiff, the Court refused to interfere.

Held, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land.

Held, also, that the 14 Geo. III., ch. 78, afforded no defence.

Quære, whether the defendants, under the circumstances, could have been compelled to put up any other than a brush fence; but if the adjoining land owners are content with such a fence, they cannot complain of it as negligence on the part of the company. In this case, however, the question as to such a fence being "brushwood" within the meaning of the declaration, or as to its being negligence in defendants to have such a fence there, was not raised at the trial.—*Holmes v. The Midland Railway of Canada*, 253.

2. *Draw-bridge — Negligence in management of—Liability of lessor or lessee.*—Defendants were incorporated to build a draw-bridge over a river, and authorized to take tolls, and their charter empowered them to let and farm the tolls. They leased the tolls accordingly, and the lessee covenanted to open and close the drawbridge, and cause it to be properly attended to. The plaintiff's horses while going down a hill ran away and threw out the driver, and then ran on the bridge. The draw had just been opened to let a vessel pass, and there being no bar or gate to close the bridge, the horses went over the opening into the water and were drowned. There had been gates there to close

the bridge while the draw was open, but they had been broken about two months previously, and the new gates which had been made were not up. The jury found that gates would have prevented the accident, and that there was no negligence on the driver's part.

Held, that the plaintiff's right of action, if any, was against the lessee, and that defendants were not liable.

Per Wilson, J.—The plaintiff was entitled to recover, though not against defendants. *Per Richards, C. J.*, and *Morrison, J.*—He was not entitled, for defendants would have done enough if they had had persons stationed to give warning when the draw was open, and they were not bound to have gates to stop runaway horses.—*Price v. The Cataract Bridge Co.*, 314.

See HIGHWAYS, 1, 3, 4—RAILWAYS AND R. W. COS., 3, 4, 5, 6, 7.

NEW TRIAL.

Misdirection—Administration of Justice Act, 1874, sec. 34.—In an action for trespass to land the jury found for the plaintiff, with only one shilling damages. The verdict was moved against for misdirection and smallness of damages, but the Court without deciding the correctness of the charge, held that if it had been unexceptional and the verdict the same, they would not have interfered, and under sec. 34 of the Administration of Justice Act, 1874, they refused a new trial.—*Smith v. Murphy*, 569.

For excessive damages.—See HIGHWAYS, 3.

See COUNTY COURT.

NOTICE OF ACTION.

See POUNDKEEPER.

NOTICE TO QUIT.

See LANDLORD AND TENANT 1, 3.

PARTIES.

To contract.]—See CONTRACT—HUSBAND AND WIFE—RAILWAYS & R. W. COS., 4—STOCK, 2.

Defendants in action for negligence.]—See NEGLIGENCE, 2—RAILWAYS AND R. W. COS., 4, 5.

PASSENGERS.

Carriage of.]—See RAILWAYS AND R. W. COS., 8.

PAYMENT.

Of rent to take case out of the Statute.]—See LIMITATIONS, STATUTE OF.

PENALTY.

Action for, for want of stamps on note.]—See BILLS AND NOTES, 2.

PLAN.

See DESCRIPTION OF LAND, 1.

PLEADING.

1. Cumbersome pleadings.]—Remarks as to the unnecessary mass of pleadings in this case.—*Nickle v. Douglas*, 126.

See BILLS AND NOTES, 1, 2—EVIDENCE—EXECUTORS AND ADMINISTRATORS—LANDLORD AND TENANT, 2.

POSSESSION.

Trespass to land—Right to maintain.]—The plaintiff and defendant,

adjoining proprietors, on lots 18 and 17 respectively. and those through whom they claimed, had occupied up to 1867 according to a fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed further to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868 F. moved his fence on to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and new line, and in 1868-9 the plaintiff cut grass on this strip. O. afterwards sold to one J., who occupied up to the old line, and sold to defendant. The plaintiff, in 1872, moved the fence to the new line, and defendant immediately replaced it, for which the plaintiff brought trespass.

Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass. *Cole v. Brunt*, 103.

POUNDKEEPER.

Notice of action.]—Defendant was in charge of the pound of the city of Toronto as poundkeeper, having so acted for seven or eight years. He had been appointed by the City Commissioner at a yearly salary, which had been paid until a short time before the act sued for (the impounding of plaintiff's pigs), when some question was raised as to the legality of his appointment. It appeared that

after the seizure he had offered to release the pigs on payment of the pound charges only; and, according to one witness, he had said he was not poundkeeper. He had not been appointed by by-law, nor given the requisite bond. The learned Judge of the County Court, trying the case without a jury, found that defendant was acting as poundkeeper in good faith, and believed, on reasonable grounds, that he was such poundkeeper.

Held, that the finding was fully justified, and that defendant was clearly entitled to notice of action. *Denison v. Cunningham*, 383.

PRACTICE.

See COMMON COUNTS—COUNTY COURT—STOCK, 2.

PROMISE.

To pay debt of another.]—See FRAUDS, STATUTE OF.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROXIMATE CAUSE.

Of accident.]—See HIGHWAYS, 3.

PURE MONEY DEMAND.

Under the Administration of Justice Act of 1873.]—*Soules v. Soules*, 334.

RAILWAYS AND R. W. COS.

1. *Compensation for land taken*—C. S. C. ch. 66, sec. 11, sub-sec. 21—*Construction of bond taken under.*]—The plaintiff owned land required by the Canada Southern R. W. Co., who obtained an order

under the Railway Act, C. S. C., ch. 66, sec. 11, sub-sec. 21, for immediate possession, and the defendants became sureties by bond for payment to the plaintiff of the compensation to be awarded within one month after making the award.

The award directed that the Company should within one month pay \$1,644 for the land taken, and also the further sum of \$400, unless the said Company should not give to the plaintiff license to remove from off the line of railway, and at any time within five months from the award, the dwelling house occupied by him and standing on the land.

Held, that defendants were not liable for this \$400, their obligation being limited to the sum which might be awarded as compensation for the land and be payable unconditionally within a month. *Murray v. Thompson et al.* 28.

2. *G. W. R.—Award for land taken—Right to withdraw after award*—4 Wm. IV. ch. 29, sec. 4—*Construction of—Action on award—Denial of plaintiff's title to the land—Purchase of land for gravel pit.*]—Sec. 4 of 4 Wm. IV. ch. 29, defendants' act of incorporation, provides that money awarded to be paid by them for lands taken shall be paid within three months from the award, and in case the company shall fail to pay the same within that period their right to assume the property shall wholly cease; "and it shall be lawful for the proprietor to resume his occupation of such property, and to possess fully his rights and privileges in respect thereof free from any claim or interference from the said company."

The plaintiffs sued defendants for money awarded to be paid to

the plaintiffs, as executors and trustees of one A., for land taken by defendants for the purposes of their railway.

Defendants pleaded, 1: That they had never taken possession of or used the land, and that forthwith after publication of the award they gave notice to the plaintiffs that they had abandoned all intention of doing so, and withdrew from the purchase. *Held*, bad on demurrer, for that defendants, under the enactment above stated, and the subsequent statutes affecting them, could not after award made withdraw from the purchase.

In a second plea, after stating the same facts, defendants added that the plaintiffs then resumed their occupation of the land, and had ever since such notice occupied the same free from any claim or interference by defendants: *Held*, a good plea; for that if the notice was given before the three months allowed for payment by sec. 4 above referred to, the plaintiffs might accept it and elect to treat the contract as ended; and if after, the plaintiffs had taken advantage, as they might do, of the right which was given by the statute for their benefit.

The third plea was that the plaintiffs had no title to the land either at the time of the arbitration and award or at the commencement of the suit: *Held*, a good defence.

Quære, whether a title acquired after the award, but before suit, would enable them to recover.

Semble, that a purchase of land for a gravel pit under 18 Vic. ch. 176, sec. 20, is to be governed by the same proceedings as purchases of other lands by the company. See judgment in note *a*, p. 159.—*Mitchell et al. v. The Great Western R. W. Co.*, 148.

3. *R. W. Co.—Fire from locomotive—Negligence in leaving brushwood on their lands—Brushwood fence—Contributory negligence—14 Geo. III. ch. 78.*—In an action against a railway company negligently allowing their land adjoining the track to remain covered with brushwood, &c., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's land, it was shewn that the railway fence, in which the fire originated, was a brush fence, the line having been recently built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under the C. S. C. ch. 66, sec. 4, and he had felled them lengthwise with the track and left them there.

The jury having found for the plaintiff, the Court refused to interfere.

Held, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land.

Held, also, that the 14 Geo. III. ch. 78, afforded no defence.

Quære, whether the defendants, under the circumstances, could have been compelled to put any other than a brush fence; but if the adjoining land owners are content with such a fence, they cannot complain of it as negligence on the part of the company. In this case, however, the question as to such a fence being "brushwood" within the meaning of the declaration, or as to its being negligence in defendants to have such a fence there, was not raised at the trial.—*Holmes v. The Midland Railway of Canada* 253.

4. *Accident through negligence — Contract limiting liability.*]—Declaration, under C. S. U. C. ch. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages, loaded with timber, along the line near said station, that a piece of timber, projecting from said carriages, struck and killed the said A.

Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise.

Held,—affirming the judgment of the Court below, Draper, C.J., dissenting—plea good, without alleging that A. was a party to or aware of the agreement. *Alexander v. Toronto and Nipissing Railway Company*, 453. (In appeal.)

5. *Setting out fire—Liability of Railway Co. for negligence of sub-contractor—Interference of the Company's engineer.*]—The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of their work of construction, including the cutting, grubbing, and clearing of the track of trees, &c., to be done to the satisfaction of the defendants' engineer, were let to M. & G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the

workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage.

Held, that the contractors, not the defendants, were *prima facie* responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence, more fully set out in the case did not shew such an interference by the engineer as would make the defendants liable.

On appeal the above decision was affirmed; and *Held*, following *Dean v. McCarty*, 2 U. C. R. 448, Blake, V.C., dissenting, that a proprietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence.

Fletcher v. Rylands et al., L. R. 3 H. L. 330, commented upon, and held not applicable to this case.

Blake, V.C., was of opinion, that upon the rule of law laid down in that case, defendants here were liable whether the fire was set out negligently or not; and that they were responsible for their contractors, because the act done, the setting out of fire, was not collateral, but was done necessarily in the work which the defendants had employed them to perform.

Quære per Draper, C. J. — Whether a count alleging only wrongfully permitting a fire to remain on a defendant's land, without averring that it was caused by him, or arose through his negligence, shews a good cause of action.

Gillson v. North Grey Railway Company, 475. (In appeal.)

6. *Highway—Open Culvert—Accident—Liability.*]—The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured.

Held, that the company were liable; for their duty was to restore the highway to its former state, or in a sufficient manner not to impair its usefulness; and, in substituting this open culvert, which they could readily have covered, for the former ditch, they had unnecessarily made it more dangerous.

Quære, whether the corporation were bound to repair this part of the highway; but, *Held*, that if so, that would not relieve the defendants.—*Fairbanks v. The Great Western R. W. Co.*, 523.

7. *Delay in carriage and neglect to deliver goods—Special conditions—Liability.*]—The plaintiff delivered to the defendants, at Stony Point, 86 hogs, and on the following day he put on board the same car, at Thamesville, on the way, 20 more hogs, to be carried to Guelph. He got at Stony Point a drover's pass to pass him in charge of his stock. The agent there said that he allowed the plaintiff to label the car "Thamesville." on condition that the plaintiff would see the label changed, and that if it had been labelled "Guelph" it would not have stopped at Thamesville at all.

The plaintiff went as far as Thamesville with the hogs, and from thence went on by express. By some error the car went round by Hamilton; a delay of several days occurred by which the hogs were injured and several died, and when the car reached Guelph nine were missing altogether. The jury found that they were lost after leaving Thamesville, but how they could not say. Upon the shipping bill, as well as upon the plaintiff's pass, was endorsed a condition that upon a free pass being given defendants would not be responsible for any negligence, default, or misconduct, gross, culpable, or otherwise, on the part of defendants or their servants, or of any other person causing, or tending to cause, the death, injury, or detention of the goods. *Held*, that the condition protected the defendants, for it sufficiently appeared that the loss must have happened from some cause within it; *Quære*, whether it was not a reasonable condition, the pass being given to enable the plaintiff to accompany and take charge of the stock. *Held*, also, that the plaintiff was to blame for not having the proper label put on at Thamesville and for not remaining himself or sending some one with the hogs.

The declaration alleged as a breach of defendants' contract the non-delivery within a reasonable time. *Held*, that under this the plaintiff might have recovered for the hogs lost and not delivered at all.—*Farr v. The Great Western R. W. Co.*, 534.

8. *Contract to carry beyond their line—Liability*]—The plaintiff purchased a ticket from defendants at Detroit for a first-class passage from Detroit to Washington, pay-

ing the fare for the whole distance. It had five coupons attached, perforated so that they could be detached and given up, each one being for the distance to be traversed over a different railway or omnibus route on the way. The plaintiff's trunk was checked to Buffalo, and when near that place, a person took his check for it, with the coupon for the omnibus route to the station of the Erie Railway, by which the plaintiff was to proceed, and gave him an omnibus check across the city of Buffalo in return. The conductor of defendants' train, being asked by the plaintiff, told him it was right to give his check to this person. The omnibus line was paid by the Erie R. W. Co. The trunk having been lost owing to the neglect of the omnibus agent: *Held*, that the defendants were liable, for the contract was with them, to carry the plaintiff and his luggage the entire distance.

It was objected that defendant had forfeited his right to be carried by having stopped over on the journey, instead of making a continuous one; but *Held*, that defendants not having insisted on the forfeiture, if they had a right to do so, and having chosen to carry him and his luggage, were bound to do so with reasonable care.—*Smith v. The Grand Trunk R. W. Co. of Canada*.—547.

9. *Arbitration—Notice of desistment*—*C. S. C. ch. 66, sec. 11, subsec. 16.*]—In an arbitration under the Railway Act, *C. S. C., ch. 66*, to determine the value of land taken, two of the arbitrators had agreed upon the sum to be awarded, and notice had been given by them to the other arbitrator on the 27th February, that they would meet on

the 1st March to sign the award. On the 27th a notice of desistment, and that a new notice would be given, was served on them, and on the 1st March a new notice was given, but the two arbitrators proceeded notwithstanding, and made their award.

Held, that the notice of desistment was effectual, and the award void.—*Carowhra v. Hamilton and Lake Erie R. W. Co.*, 581.

10. *Obligation to fence.*]—*M.*, the owner of land adjoining a railway, took down the fence separating it from the track, with the assent of the railway company, in order to supply them with wood cut upon the land. He then sold the land to one *C.*, stipulating that he should retain one or two acres on which this wood was piled. *C.* afterwards leased the east half of the land to the plaintiff, containing part of the land retained by *M.*, and *C.* allowed the plaintiff's cattle to run on the west half, there being no line fence between them. The plaintiff's cattle escaped from this west half on to the railway, where the fence had been removed by *M.*, and were killed.

Held, that the plaintiff could not recover, for the facts shewed a license by implication from *C.* to leave the fence as it was, and the plaintiff, as *C.*'s licensee, could have no better right than *C.*: *Held*, also, that as the fence was originally removed with the assent of the parties interested in it, the defendants could not be liable without a notice to erect it from some one duly authorized, of which there was no evidence.—*Kilmer v. Great Western R. W. Co.*, 593.

By-law to aid, by taking stock in.]—*See STOCK*, 1.

See STREET RAILWAY.

REFORMATION OF DEED.

See EVIDENCE.

REGISTRATION.

Midland R. W. Co.—10 Vic. ch. 109—*Registry fees on deeds.*]—By the 10 Vic. ch. 109, the Registrar was entitled to receive only the sum of 2s. 6d. from defendants for registering deeds made to them in the form given by the Act. In 1865 the registry law was changed, and deeds were required to be registered in full, instead of by memorial, as before. In 1873 and 1874 defendants brought for registry deeds made to them, which contained covenants for title not in the statutory form: *Held*, that for such deeds the Registrar was entitled to charge his full fees, and was not restricted to the 2s. 6d.—*Ward v. Midland Railway of Canada*, 120.

See MORTGAGE.

REGULÆ GENERALES.

193, 430.

REMOTE CAUSE.

Of accident.]—See HIGHWAYS, 3.

RETAIL.

Sale of liquor by.]—See LIQUOR, SALE OF, 4.

ROAD.

See HIGHWAYS.

SALE OF GOODS.

1. "Tools," meaning of—*Contract—Party to sue—Evidence of admissions.*]—On a sale of malleable iron works "and all machinery and tools in and about the said works connected therewith:" *Quære*, whether annealing pots, used in the manu-

facture of the iron, would pass under the word "tools;" but, *Held*, that this was a question for the jury.

Where in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant for the sale by the latter to the former, but the land on which the works and machinery were conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration. *Held*, that the plaintiff, and not his wife, was the proper person to sue.

Held, also, that the acts or admissions of the plaintiff were clearly admissible in evidence.—*Filschke v. Hogg*, 94.

2. *Warranty.*]—The question being whether defendant had warranted a hearse sold by him to the plaintiff to be new, it appeared that defendant, having two hearses for sale, one of which was old and the other all new except a part of the running gear, the plaintiff came to him to purchase. Defendant said his old hearse was at a place named, where they went to see it. Plaintiff then said that he wished to see the new one, and they went to the paint-shop where it was, the wheels being off, and the last coat of paint not finished, with some ornamental work yet to be done. The plaintiff examined it, and having agreed on the price, then went to the house of one S., a friend, where the following memorandum was drawn up:—

"Messrs. Baker & Blewett, (plaintiffs), to S. Fawkes, (defendant), Drs. :

To 1 new hearse; 1 set ostrich plumes; also, 1 set white plumes. \$800
Received on account..... 300

Interest at 7 per cent.—balance. \$500

"Hearse to be delivered at station in Toronto, finished and complete."

This the plaintiff said was prepared by S. as the memorandum of the terms of sale. The last line was added at plaintiffs' request. S. said he wrote the memorandum (which was not signed by defendant) without dictation, and used the word new to distinguish it from defendant's old hearse. The defendant said he always spoke of the two in that way for distinction: that he told the plaintiff a portion of the running gear was not new, and that the plaintiff, who examined it carefully, could not have failed to see this. The plaintiff, on the other hand, said the defendant told him it was new, which he believed, and that he would not otherwise have purchased.

Held, that it was a question for the jury whether defendant sold his new hearse, calling it new simply as a matter of description, without any warranty that it was new, or whether he described it as a new hearse, and contracted to sell it as such; and in an action on the alleged warranty a nonsuit was set aside.—*Baker et al. v. Fawkes*, 302.

3. *Sale by sample — Purchase by committee of corporation — Acceptance — Want of corporate seal.* — The corporation of a town appointed a committee, consisting of the reeve and two others, to purchase 1,500 feet of hose for the use of the water works. They called for tenders, and the two plaintiffs, of whom the reeve was one, submitted a sample of hose, on which the other two members of the committee gave plaintiffs the order. The hose was tested when it arrived, and was the same as the sample, but it was useless for the purpose required.

Held, that the corporation, on the evidence, more fully set out in the case, had not accepted the hose absolutely, but conditionally only, to keep it if they found it to answer: that they were not liable for it as being bound by the conduct of the committee, for want of an agreement under the corporate seal; and that such contract, being executed, might also be avoided, because one of the plaintiffs was a member of the committee. *Brown and Mann v. The Corporation of the Town of Lindsay*, 509.

SALE OF LAND.

Contract to buy land and erect a factory — Breach — Measure of damages. — Defendant on the 14th of March, 1872, agreed to buy two acres of land in a village from the plaintiff, for \$325, and to complete upon it within 18 months a brick factory of specified dimensions, and at or before its completion to commence and prosecute therein the manufacture of plated-ware on a scale commensurate with its size; and that in case he should not perform his agreement in this respect he would at the end of the 18 months reconvey the land to the plaintiff, receiving back the purchase money, \$325, and compensating the plaintiff for damages, if any. The defendant did not pay the purchase money and at the end of 16 months elected not to go on with the agreement, whereupon the plaintiff sued, alleging in his declaration that the plaintiff's adjoining land would have been much enhanced in value by the sale to defendant, and the erection of the factory, and claiming as damages profits which he would have derived therefrom. *Held*, that such

damages were not recoverable, being altogether too remote.

Quare, whether he could recover interest, though he had demanded the \$325, for he had not offered at the time to make a conveyance.—*Dullea v. Taylor*, 395.

SAMPLE.

Sale of goods by.—See SALE OF GOODS, 3.

SCHOOLS.

See HIGH SCHOOLS.

SEAL.

Want of, in contract with corporation.—See SALE OF GOODS, 3.

SET-OFF.

See BILLS AND NOTES, 1.

SHELLEYS CASE.

See ESTATE.

SHIP.

See CARRIER—DAMAGES, 2.

SHORT FORMS OF CONVEYANCES.

Covenants in.—See COVENANT, 2.

STAMPS.

Action for not affixing to note.—See BILLS AND NOTES, 2.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES.

Statement of Statutes in pleading.—See BILLS AND NOTES, 2.

STATUTES—CONSTRUCTION OF.

Administration of Justice Act, 1874, sec. 34.]—See NEW TRIAL.

Law Reform Act, sec. 17, sub sec. 4. 5.]—See COUNTY COURT.

Municipal Act, 1866, sec. 341.]—See HIGHWAYS, 4.

Municipal Act, 1873, secs. 410 *et. seq.*]—See HIGHWAYS, 1.

Consol. Stat. C. ch. 66, sec. 11, subsec. 21.]—See RAILWAYS AND R. W. COS., 1.

Consol. Stat. C. ch. 66, sec. 11, subsec. 16.]—See RAILWAYS AND R. W. COS., 9.

Consol. Stat. U. C. ch. 16, secs. 63, 65.]—See ADMINISTRATION BOND.

Consol. Stat. U. C. ch. 49, sec. 69.]—See HIGHWAYS, 4.

Consol. Stat. ch. 78.]—See RAILWAYS AND R. W. COS., 4.

14 Geo. III. ch. 78.]—See NEGLIGENCE, 1—RAILWAYS AND R. W. COS., 3.

4 Wm. IV. ch. 29, sec. 4.]—See PLEADING, 2—RAILWAYS AND R. W. COS., 2.

9 Vic. ch. 109.]—See MIDLAND RAILWAY OF CANADA—REGISTRATION.

18 Vic. ch. 176, sec. 20.]—See GRAVEL PIT

31 Vic. ch. 9, secs. 11, 12, D.]—See BILLS AND NOTES, 2.

36 Vic. ch. 13, D.]—See BILLS AND NOTES, 2.

32 Vic. ch. 21, O.]—See ASSESSMENT AND TAXES, 3.

32 Vic. ch. 32, sec. 6, O.]—See LIQUOR, SALE OF, 2, 3.

32 Vic. ch. 36, O.]—See ASSESSMENT AND TAXES, 1, 2.

33 Vic. ch. 71, O.]—See ARREST OF JUDGMENT.

34 Vic. ch. 33, sec. 40, O.]—See HIGH SCHOOLS.

36 Vic. ch. 38, O.]—See STOCK, 1.

37 Vic. ch. 32, O.]—See LIQUOR, SALE OF, 1, 2, 3.

STOCK.

1. *By-Law to take stock in Railway Co.*—*Mandamus.*]—A Township Corporation passed a by-law

that the Reeve should make out debentures not exceeding \$5000, which should be sealed with the corporate seal and signed by him and the Treasurer; and that, providing the grading of the defendants' railway should be completed to a certain point by a day mentioned, the Reeve should subscribe for shares in defendants' company to the extent of \$5000, on behalf of the Corporation, and deliver said debentures to the company in payment therefor. By 36 Vic. 98, O., the by-law was confirmed.

On application for a mandamus to the Reeve to make such subscription and delivery: *Held*, unnecessary to shew an agreement by the municipality to take the stock, or a written subscription, or to make the Treasurer or the Corporation parties to the application; and on the affidavits set out in the report the mandamus was granted with costs.—*In re Canada Central Railway Co. and George Brown, Reeve of Admaston*, 390.

2. *Sale of — Note for purchase money—Omission to assign part — Preparation of transfer — Practice under Administration of Justice Act, 1873.*—To a declaration against maker and endorser of a note, defendants pleaded separately, that before the making of the note the plaintiff and her husband sold all their interest and stock in a certain railway company to defendant H. for \$55,000, and in consideration that plaintiff and her husband should assign, convey, assure, and transfer the same to H., H. agreed to pay said \$55,000 on certain days, and to give his notes therefor endorsed by the other defendant, B., and that until the whole of said stock, &c., had been conveyed to H. neither H. nor the

other defendant should be required to pay said notes or any part thereof: that this was one of the notes, and was made on the faith that the stock had been conveyed; and that afterwards the plaintiff and her husband refused to complete the conveyance of all their stock, and only assigned part thereof, and retained thirty shares.

The plaintiff replied that at the time of making said agreement, and from thence hitherto, she and her husband were, and still are, ready and willing, and hereby offer to assign to H. said thirty shares, on his request, of which he had notice, but that H. never requested such transfer.

Held, on demurrer to the replication, 1. That if no conveyance had ever been executed it would have been the duty of H. to prepare the necessary transfer for execution; but 2. That the plaintiff having conveyed all that she professed to have in the company, it was her duty to prepare, at her own cost, the extra conveyance of the thirty shares rendered necessary by her own default in not transferring them before.

Semble, that under the Administration of Justice Act, 1873, if all the other issues had been disposed of, the Court might have allowed plaintiff to convey the thirty shares, paying the costs of suit, and directed the defendant then to pay the note, and that the plaintiff's husband should be made a party; but there being other issues to be tried judgment was given for defendants on demurrer, reserving judgment on the equitable rights of the parties.—*Emily M. Boulton v. Hugel and Bickford*, 402.

See BANK STOCK.

STREET RAILWAY.

Toronto Street R. W. Co.—Assessment of.—*Held*, Morrison, J., dissenting, that under the Assessment Act, 32 Vic. ch. 36, O., the Toronto Street Railway Company was assessable for those portions of the streets occupied by them for the purpose of their railway, as being real estate, within the meaning of sec. 3 of the statute. *The Toronto Street Railway Company v. Fleming*, 264.

[Since reversed on appeal.]

STREETS.

Assessment of part of used by Street Railway.—*See* ASSESSMENT AND TAXES, 2.

TAVERNS.

See LIQUOR, SALE OF.

TAXES.

See ASSESSMENT AND TAXES.

TENDER.

Averment of.—*See* BILLS AND NOTES, 1—EXECUTORS AND ADMINISTRATORS.

Of conveyance.—*See* STOCK, 2.

TIMBER LIMITS.

See BILLS AND NOTES.

TOOLS.

Meaning of.—*See* SALE OF GOODS, 1.

TRADER.

Banker and broker is.—*See* INSOLVENCY, 5.

TRESPASS.

Trespass to land—Right to maintain—Possessory title.—The plain-

tiff and defendant, adjoining proprietors, on lots 18 and 17 respectively, and those through whom they claimed, had occupied up to 1867 according to a fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed further to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868, F. moved his fence on to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and the new line, and in 1868-9 the plaintiff cut grass on the strip. O. afterwards sold to one J., who occupied up to the old line, and sold to defendant. The plaintiff, in 1872, moved the fence to the new line, and defendant immediately replaced it, for which the plaintiff brought trespass.

Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass. *Cole v. Brunt*, 103.

TROVER.

See DAMAGES, 2.

VERDICT.

Action on common counts—Issues divisible.—In an action on the common counts, the pleas of *nunquam indebitatus* and payment are distributive, and a verdict may be entered on these issues for so

much of the amount sued for as the plaintiff fails to recover.

Such a verdict may not be proper in every case. In this case the substantial question at the trial was the plaintiff's right to a sum of \$410, which the jury found for defendants, but the plaintiffs had a verdict for a sum of \$20, which defendants never had disputed, and had, as they asserted, unintentionally omitted to pay. Under these circumstances the verdict was entered in defendants' favour for the residue. *Hope et al. v. Stewart et al.* 89.

VOTERS' LIST.

Change of name in, consequent on change of occupation before revision.]
See ASSESSMENT AND TAXES, 3.

WAIVER.

Of notice to quit, by accepting rent.]
—*Manning v. Dever et al.* 294.

Of objections to recognisance.]--See
APPEAL, 1.

WARRANTY.

See SALE OF GOODS, 2.

WAYS.

See HIGHWAYS.

WORDS.

Construction of "Tools."]--See
SALE OF GOODS, 1.

YEARLY TENANCY.

See LANDLORD AND TENANT, 3.



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